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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 54

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES M. RAGEN

No. 55

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ARNOLD W. KRUSE

No. 56

THE UNITED STATES OF AMERICA, PETITIONER

vs.

LESTER A. KRUSE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 22, 1941
CERTIORARI GRANTED JUNE 2, 1941



IN THE
United States Circuit Court of Appeals
For the Seventh Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
7462 *vs.*

WILLIAM MOLASKY, *Defendant-Appellant*.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
7463 *vs.*

JAMES M. RAGEN, *Defendant-Appellant*.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
7464 *vs.*

JAMES M. RAGEN, JR., *Defendant-Appellant*.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
7465 *vs.*

LESTER A. KRUSE, *Defendant-Appellant*.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
7466 *vs.*

ARNOLD W. KRUSE, *Defendant-Appellant*.

—

Appeals from the District Court of the United States for
the Northern District of Illinois, Eastern Division.

INDEX.

VOLUME I.

| | |
|--|----|
| Placita | 1 |
| Indictment, filed August 22, 1939 | 2 |
| Petition of Annenberg, et al., to release Oaths of Secrecy, etc., filed October 30, 1939 | 28 |
| Petition of Kruse, et al., to release Oaths of Secrecy, etc. | 43 |
| Petition of Molasky to release Oaths of Secrecy, etc. | 54 |
| Order on petitions to release Oaths of Secrecy, etc., entered November 7, 1939 | 63 |
| Bills of Exceptions in matter of Oaths of Secrecy, filed December 20, 1939 | 64 |
| Order approving Bill of Exceptions re Oaths of Secrecy, entered December 20, 1939 | 67 |
| Plea in Abatement No. 1 of Molasky, filed November 15, 1939 | 68 |
| Plea in Abatement No. 2 to Fifth Count of Molasky, filed November 15, 1939 | 73 |
| Exhibit A—Oath of Earl C. Crouter | 79 |
| Exhibit B—Oath of E. Riley Campbell | 80 |
| Exhibit C—Oath of Samuel Klaus | 80 |
| Plea in Abatement No. 1, of Kruse, et al., filed November 15, 1939 | 81 |
| Plea in Abatement No. 2 to Fifth Count of Kruse, et al., filed November 15, 1939 | 87 |
| Exhibit A—Oath of Earl C. Crouter | 93 |
| Exhibit B—Oath of E. Riley Campbell | 94 |
| Exhibit C—Oath of Samuel Klaus | 95 |
| Plea in Abatement No. 1, of Ragen, et al., filed November 15, 1939 | 96 |

| | |
|--|-----|
| Plea in Abatement No. 2 to Fifth Count of Annenberg, et al. | 103 |
| Exhibit A—Oath of Earl C. Crouter..... | 111 |
| Exhibit B—Oath of E. Riley Campbell..... | 112 |
| Exhibit C—Oath of Samuel Klaus..... | 113 |
| Motion to Strike Pleas in Abatement No. 1, filed No- vember 27, 1939 | 114 |
| Motion to Strike Pleas in Abatement No. 2..... | 115 |
| Order as to motions to strike, etc., entered November 27, 1939 | 116 |
| Order granting leave to file letters of authority, en- tered December 11, 1939 | 117 |
| Letter of May 26, 1939, appointing George S. Robin- son Special Assistant, filed December 11, 1939..... | 118 |
| Letter of May 18, 1939, appointing James V. Hayes Special Assistant, filed December 11, 1939..... | 119 |
| Letter of May 18, 1939, appointing Sam Nell Special Assistant, filed December 11, 1939..... | 120 |
| Memorandum on motions to strike Pleas in Abatement, filed December 19, 1939 | 121 |
| Order striking Pleas in Abatement Nos. 1 and 2, en- tered December 21, 1939 | 125 |
| Order granting leave to file Pleas in Bar, entered De- cember 21, 1939 | 126 |
| Bill of Exceptions on Pleas in Abatement, filed Feb- ruary 14, 1940 | 127 |
| Order approving Bill of Exceptions on Pleas in Abate- ment, entered February 14, 1940..... | 132 |
| Special Plea in Bar of Molasky (Immunity Plea), filed January 10, 1940 | 133 |
| Subpoena | 139 |
| Special Plea in Bar of Ragen, Jr. (Immunity Plea), filed January 10, 1940 | 141 |
| Summons | 145 |

| | |
|--|-----|
| Motion to Dismiss Plea in Bar of Molasky (Immunity Plea), filed January 15, 1940 | 146 |
| Exhibit A—Affidavit of William J. Campbell.... | 150 |
| Motion to Dismiss Plea in Bar of Ragen, Jr. (Immunity Plea), filed January 15, 1940 | 156 |
| Exhibit A—Affidavit of William J. Campbell.... | 160 |
| Motion to Strike Affidavit of William J. Campbell, filed January 18, 1940 | 165 |
| Motion of Molasky for leave to file Amended Special Plea in Bar, filed February 13, 1940 | 168 |
| Amended Special Plea in Bar of Molasky | 168 |
| Exhibit A—Summons | 175 |
| Exhibit B—Subpoena Duces Tecum | 176 |
| Exhibit C—Summons | 178 |
| Motion of Molasky to withdraw Special Plea in Bar, filed February 16, 1940 | 179 |
| Order granting leave to Molasky to file Demurrer, nunc pro tunc as of January 5, 1940, entered April 1, 1940 | 179 |
| Order granting leave to Molasky to file Amended Special Plea in Bar, entered April 1, 1940 | 180 |
| Amended Special Plea in Bar of Molasky, filed April 1, 1940 | 180 |
| Exhibit A—Summons | 187 |
| Exhibit B—Subpoena Duces Tecum | 188 |
| Exhibit C—Summons | 190 |
| Motion to Dismiss Special Amended Plea in Bar of Molasky, filed April 1, 1940 | 191 |
| Exhibit A—Affidavit of William J. Campbell.... | 195 |
| Order granting leave to file Demurrers to Indictment, nunc pro tunc as of January 5, 1940, entered April 1, 1940 | 201 |
| Order on motion to dismiss Pleas, entered April 1, 1940 | 201 |

| | |
|--|-----|
| Demurrer of Kruse, et al., to Indictment, filed April 1, 1940 (Nunc pro tunc as of January 5, 1940)..... | 202 |
| Demurrer of Molasky to Indictment, filed April 1, 1940 (Nunc pro tunc as of January 5, 1940)..... | 206 |
| Demurrer of Annenberg, et al., to Indictment, filed April 1, 1940 (Nunc pro tunc as of January 5, 1940) .. | 210 |
| Order as to Pleas of Immunity, entered April 2, 1940 .. | 215 |
| Order as to Demurrers, entered April 3, 1940..... | 215 |
| Order as to Pleas in Bar, entered April 3, 1940..... | 216 |
| Order as to Pleas of Immunity, entered April 3, 1940 .. | 216 |
| Order overruling Demurrers, entered April 11, 1940 .. | 217 |
| Order dismissing Immunity Pleas of Ragen, Jr., and Molasky, entered April 11, 1940..... | 217 |
| Order on Trial, entered April 23, 1940..... | 219 |
| Motion of Ragen, et al., to withdraw pleas of not guilty, etc., filed May 23, 1940..... | 220 |
| Affidavit of John F. Tyrrell | 220 |
| Order on motion to withdraw pleas of not guilty, etc., entered May 23, 1940 | 225 |
| Order impounding Stipulation, entered June 4, 1940 .. | 225 |
| Stipulation as to dismissal of certain Defendants, etc. | 226 |
| Order dismissing Indictment as to certain Defendants, entered July 22, 1940..... | 227 |
| Motion to dismiss Indictment as to certain Defendants, filed July 22, 1940..... | 228 |
| Order as to withdrawal of appearance of John M. Tyrrell, etc., entered September 4, 1940..... | 229 |
| Motion of Kruse, et al., to dismiss Indictment and for directed verdict, filed September 10, 1940..... | 230 |
| Motion of Ragen, et al., to dismiss Indictment and for directed verdict, filed September 10, 1940..... | 232 |
| Motion of Molasky to dismiss Indictment and for directed verdict, filed September 10, 1940..... | 234 |

| | |
|---|-----|
| Order overruling motions to dismiss and for directed verdict, entered September 11, 1940..... | 236 |
| Verdict as to Molasky, Arnold Kruse, Ragen, Sr., Ragen, Jr., and The Consensus Publishing Co., filed September 12, 1940 | 237 |
| Verdict as to Lester A. Kruse, filed September 12, 1940 | 238 |
| Order overruling motions for new trial and motions in arrest of judgment, entered September 12, 1940.... | 238 |
| Judgment as to James M. Ragen, entered September 12, 1940 | 239 |
| Judgment as to James M. Ragen, Jr., entered September 12, 1940 | 240 |
| Judgment as to Arnold W. Kruse, entered September 12, 1940 | 241 |
| Judgment as to Lester A. Kruse, entered September 12, 1940 | 243 |
| Judgment as to William Molasky, entered September 12, 1940 | 244 |
| Judgment as to The Consensus Publishing Co., entered September 12, 1940 | 245 |
| Order as to supersedeas Bonds, entered September 12, 1940 | 246 |
| Order as to Appeal Bonds of Lester A. Kruse and Ragen, Jr., entered September 12, 1940..... | 247 |
| Motion of Lester A. Kruse for new trial, filed September 14, 1940 | 247 |
| Motion of James M. Ragen for new trial, filed September 14, 1940 | 250 |
| Motion of James M. Ragen, Jr., for new trial, filed September 14, 1940..... | 251 |
| Motion of William Molasky for new trial, filed September 14, 1940 | 251 |

| | |
|--|-----|
| Motion of Arnold W. Kruse for new trial, filed September 14, 1940 | 252 |
| Motion of William Molasky in arrest of judgment, filed September 14, 1940 | 255 |
| Motion of Arnold W. Kruse in arrest of judgment, filed September 14, 1940 | 255 |
| Motion of Lester A. Kruse in arrest of judgment, filed September 14, 1940 | 256 |
| Motion of James M. Ragen in arrest of judgment, filed September 14, 1940 | 256 |
| Motion of James M. Ragen, Jr., in arrest of judgment, filed September 14, 1940 | 257 |
| Bond of William Molasky, filed September 14, 1940... | 257 |
| Order approving bond of Molasky, entered September 14, 1940 | 260 |
| Bond of Lester A. Kruse, filed September 16, 1940... | 260 |
| Bond of Arnold W. Kruse, filed September 16, 1940... | 262 |
| Order approving bond of Arnold W. Kruse, entered September 16, 1940 | 264 |
| Bond of James M. Ragen, Sr., filed September 16, 1940 | 264 |
| Bond of James M. Ragen, Jr., filed September 16, 1940 | 266 |
| Notice of Appeal of Lester A. Kruse, filed September 16, 1940 | 268 |
| Notice of Appeal of Arnold W. Kruse, filed September 16, 1940 | 270 |
| Notice of Appeal of William Molasky, filed September 16, 1940 | 273 |
| Notice of Appeal of James M. Ragen, filed September 16, 1940 | 279 |
| Notice of Appeal of James M. Ragen, Jr., filed September 16, 1940 | 285 |

| | |
|--|-----|
| Order approving bonds of Ragen, Sr., and Ragen, Jr., entered September 16, 1940 | 291 |
| Order as to originals of Bills of Exceptions, entered September 23, 1940 | 292 |
| Order as to Bill of Exceptions, entered September 24, 1940 | 293 |
| Notice and Praecept for Record, filed September 24, 1940 | 294 |
| Additional Praecept for Record, filed October 2, 1940 .. | 299 |
| Motion to strike portions of Appellant's Praecept, filed October 2, 1940 | 300 |
| Clerk's Certificate | 302 |

PAPERS FILED IN THE CIRCUIT COURT OF APPEALS.

| | |
|---|-----|
| Stipulation as to briefs and argument in Immunity Pleas, etc., filed November 27, 1940 | 303 |
| Stipulation as to printing record, filed November 29, 1940 | 303 |
| Bill of Exceptions on Immunity Pleas | 307 |
| Decision on Motion to Dismiss Pleas, etc. | 309 |
| Assignment of Errors of Ragen, Jr., and Molasky .. | 313 |
| Order approving Bill of Exceptions on Immunity Pleas | 313 |

BILL OF EXCEPTIONS.

VOLUME II.

| | |
|----------------|---------------|
| Colloquy | 443, 457, 474 |
|----------------|---------------|

GOVERNMENT'S WITNESSES.

Testimony of:

| | |
|---------------------------|-----|
| Brooks, Gordon | 350 |
| Burrs, Clyde | 339 |
| Clark, Howard | 410 |
| Dillthey, Gilbert | 366 |
| Eisenberg, Meyer M. | 369 |
| Hyland, James W. | 424 |
| Kamin, Herbert S. | 371 |
| Keeler, Katherine | 399 |
| Maas, Philip | 423 |
| Matheis, George | 321 |
| Meyer, Gilbert | 363 |
| Norton, Helen J. | 316 |
| Rohan, Patrick A. | 398 |
| Sandberg, Clarence C. ... | 357 |
| Taylor, Jules | 346 |
| Walter, Eugene J | 364 |
| Zweig, Julius | 319 |

GOVERNMENT'S EXHIBITS.

| | |
|--|-----|
| No. 59—Stock Certificate in name of Julius Taylor... | 372 |
| No. 70—Letter, Jan. 4, 1934, Molasky to Matheis..... | 332 |
| No. 73—Letter, Dec. 21, 1933, to Molasky..... | 331 |
| No. 82—Employment Contract, dated Jan. 2, 1932.... | 382 |
| No. 83—Assignment, dated Jan. 2, 1932..... | 382 |
| No. 107—Original Stock Certificate | 366 |

| | |
|---|-----|
| No. 108—Original Stock Certificate | 368 |
| No. 109—Letter, Oct. 1, 1929, A. W. Kruse to Molasky | 436 |
| No. 115—Telegram, A. W. Kruse to Molasky..... | 359 |
| No. 119—Letter, Jan. 6, 1933, Molasky to Kruse..... | 356 |
| No. 120—Letter, Feb. 14, 1933, Molasky to Kruse.... | 357 |
| No. 200—Letter, Aug. 27, 1934, Kamin to Molasky... | 377 |
| No. 201—Letter, Apr. 9, 1935, Kamin to Molasky.... | 380 |
| No. WP-12—Work Sheet showing percentages disbursed each week | 414 |
| No. 29-CR-1—Weekly Sheet | 333 |
| No. 33-CR-33—Weekly Report, week of Aug. 19, 1933. | 335 |
| List of Government Exhibits | 445 |
| List of First National Bank Exhibits..... | 452 |
| List of Mississippi Valley Trust Co. Exhibits..... | 455 |
| Oral decision on Motion to Dismiss..... | 464 |
| Charge to Jury | 466 |
| Assignments of Error | 478 |
| Order approving and settling Bill of Exceptions..... | 479 |
| Clerk's Certificate to Bill of Exceptions..... | 480 |
| Order granting leave to Molasky to file Additional Assignments of Error, entered Jan. 6, 1941..... | 481 |
| Additional Assignments of Error of Molasky, filed Jan. 6, 1941 | 481 |
| Order granting leave to Ragen, et al., to file Additional Assignments of Error, entered Jan. 6, 1941..... | 482 |
| Additional Assignments of Error of Ragen, et al., filed Jan. 6, 1941 | 482 |
| Order granting leave to Kruse, et al., to file Additional Assignments of Error, entered Jan. 6, 1941..... | 483 |
| Additional Assignments of Error of Kruse, et al., filed Jan. 6, 1941..... | 484 |

| | |
|---|--------|
| dings in U. S. C. C. A., Seventh Circuit..... | 485 |
| Caption..... | 485 |
| Opinion, Major, J..... | 487 |
| Dissenting opinion, Kerner, J..... | 504 |
| Judgment, Cause No. 7462..... | 505 |
| Judgment, Cause No. 7463..... | 506 |
| Judgment, Cause No. 7464..... | 506 |
| Judgment, Cause No. 7465..... | 507 |
| Judgment, Cause No. 7466..... | 507 |
| Order denying petition for rehearing..... | 507 |
| Clerk's certificate..... | 508 |
| Orders allowing certiorari..... | 509-11 |



| | |
|---|--------|
| Proceedings in U. S. C. C. A., Seventh Circuit..... | 485 |
| Caption | 485 |
| Opinion, Major, J..... | 487 |
| Dissenting opinion, Kerner, J..... | 504 |
| Judgment, Cause No. 7462..... | 505 |
| Judgment, Cause No. 7463..... | 506 |
| Judgment, Cause No. 7464..... | 506 |
| Judgment, Cause No. 7465..... | 507 |
| Judgment, Cause No. 7466..... | 507 |
| Order denying petition for rehearing..... | 507 |
| Clerk's certificate..... | 508 |
| Orders allowing certiorari..... | 509-11 |

1 IN THE DISTRICT COURT OF THE UNITED STATES,

Placita.

For the Northern District of Illinois,

Eastern Division.

Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois, begun and held in the United States Court House in the City of Chicago in the division and district aforesaid on the first Monday of July (it being the twenty-second day of August the indictment was filed) in the year of our Lord One Thousand Nine Hundred and Forty and of the Independence of the United States of America the 165th year.

Present: The Honorable Charles E. Woodward, the Honorable James H. Wilkerson, the Honorable Michael L. Igoe, the Honorable Walter C. Lindley, Eastern District of Illinois, sitting by designation, and the Honorable William H. Holly, being judges of said Court.

The Honorable Walter C. Lindley, Trial Judge.
William H. McDonnell, U. S. Marshal.
Hoyt King, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

United States of America, }
vs. } No. 31,760.
Moses L. Annenberg, *et al.* }

Be It Remembered, that the above-entitled action was commenced by the filing of the following Indictment in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 22nd day of August, A. D. 1939.

Filed
AUG. 22,
1939.

3

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Indictment No. 31760.

United States of America,

vs.

Moses L. Annenberg, alias Moses Louis Annenberg, alias M. L. Annenberg; William Molasky; Jules Taylor, alias J. Taylor; Arnold W. Kruse, alias A. W. Kruse; Lester A. Kruse, alias Lester Kruse; James M. Ragen, alias J. M. Ragen, alias James Ragen, Sr., alias J. M. Ragen, Sr.; James M. Ragen, Jr., alias James Rogers, alias J. M. Ragen, Jr.; Herbert S. Kamin, alias H. S. Kamin; The Consensus Publishing Company, an Illinois Corporation.

VIO: Sec. 145, Title 26, U. S. C. A.—Internal Revenue Laws. Sec. 88, Title 18, U. S. C. A.—Conspiracy. (Attempting to defeat and evade income taxes of a corporation for the years 1933 to 1936, both inclusive. Conspiring to defeat and evade income taxes of a corporation from 1929 to 1936, both inclusive.)

William J. Campbell,
United States Attorney.

Filed August 22, 1939.

4

IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA,

For the Northern District of Illinois,

Eastern Division.

Of the July Term, in the Year 1939.

First Count.

United States of America,
Northern District of Illinois, } ss.
Eastern Division.

INDICTMENT.

The grand jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern

District of Illinois at the June Term of said Court in the year 1939, having begun but not finished during said June Term of Court among other things an investigation of the matters charged in this indictment, and having continued to sit by order of this Court in and for said division and district during the July Term of said Court for the purpose of finishing investigations begun but not finished during said June Term of Court, pursuant to request of the United States Attorney and upon motion of the grand jury, and inquiring for said division and district at the July Term of said Court in the year 1939, upon their oaths present and charge that:

Moses L. Annenberg, otherwise known as Moses Louis Annenberg and M. L. Annenberg, late of the City of Philadelphia, State of Pennsylvania;

William Molasky, late of the City of St. Louis, State of Missouri;

Jules Taylor, otherwise known as J. Taylor, late of the City and State of New York;

Arnold W. Kruse, otherwise known as A. W. Kruse, late of the City of Chicago, State of Illinois;

Lester A. Kruse, otherwise known as Lester Kruse, late of the City of Chicago, State of Illinois;

James M. Ragen, otherwise known as J. M. Ragen, James M. Ragen, Sr., and J. M. Ragen, Sr., late of the City of Chicago, State of Illinois;

James M. Ragen, Jr., alias James Rogers, otherwise known as J. M. Ragen, Jr., late of the City of Chicago, State of Illinois;

Herbert S. Kamin, otherwise known as H. S. Kamin, late of the City of Chicago, State of Illinois;

The Consensus Publishing Company, an Illinois corporation;

hereinafter in this indictment sometimes called the defendants, on, to wit, March 15, 1934, at Chicago, in said State, and in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, unlawfully did wilfully and knowingly attempt to evade and defeat a large part, to wit, \$9,678.02, of a tax imposed on the net income of the Consensus Publishing Company, a corporation, for the calendar year 1933, which tax was imposed by an Act of Congress approved June 6, 1932, entitled "An Act to Provide Revenue, Equalize Taxation, and for other Purposes," which Act of Congress is known

as the Revenue Act of 1932, which said unlawful and wilful attempt to defeat and evade said tax was by the means and in the manner following, that is to say:

That the said Consensus Publishing Company, hereinafter sometimes called the corporation, during the calendar year 1933, and up to and including March 15, 1934, was a corporation existing and doing business under and by virtue of the laws of the State of Illinois, engaged in the business of publishing and distributing information concerning horse races and kindred data, and more specifically the printing and selling of so-called "Run Down Sheets" to a class of persons known as "bookmakers," with its principal place of business at Chicago aforesaid, in said State and within the First Internal Revenue Collection District of Illinois, said corporation also maintaining divers other offices for the conduct of its business in the Cities of St. Louis, State of Missouri, and Cincinnati, State of Ohio, and was not a corporation exempt from taxation under the provisions of the Act of Congress aforesaid; and the said defendant, William Molasky, was at all times hereinafter set forth and during the Calendar year 1933, the duly elected and acting president and employee of said corporation; that the regular annual accounting period of the said corporation was on the basis of the calendar year and the said corporation was then and there required by the Act of Congress aforesaid and pursuant to rules and regulations made and prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury of the United States of America, as authorized in and by virtue of the Act of Congress aforesaid, to make to the Collector of Internal Revenue for the said Collection District, a return for the calendar year 1933, after the close of the calendar year 1933, and on or before March 15, 1934, stating specifically the items of its gross income and the deductions and credits allowed by Title I (Income Tax) of the said Act of Congress, duly sworn to, and by reason of the fact, which the said Grand Jurors upon their oaths charge to be a fact, that during the said calendar year 1933 the said corporation had and derived a gross income (exclusive of items which, under said Revenue Act shall not be included in gross income) of, to wit, \$119,960.96, derived as follows, that is to say:

Gross Profit from Sales.....\$119,960.96

and that during the said calendar year 1933 the said corporation was entitled to and allowed by the provisions of said Title I of said Act of Congress deductions (in addition to deductions allowed in computing the gross income as aforesaid) in the sum of, to wit, \$38,789.16, on account of the following:

| | |
|---------------------------------|-----------|
| Rent on Business Property | \$ 562.50 |
| Interest | 89.55 |
| Taxes | 300.00 |
| Depreciation | 1,821.00 |
| Salaries and Wages | 12,757.56 |
| Expenses | 23,258.55 |

Total Deductions\$38,789.16

and the said corporation had, derived and received a net income for said calendar year 1933, to wit, the gross income less the deductions allowed by law of, to wit, \$81,171.80, upon which said net income of said corporation for said calendar year 1933, an income tax of, to wit, \$13,340.22, under the Act of Congress aforesaid, became and was due by the corporation, on, to wit, March 15, 1934, to the United States of America, one-fourth of the amount of which at least should then and there have been paid by the said corporation to the said Collector of Internal Revenue for the said First Internal Revenue Collection District of Illinois:

That the said defendants, knowing the premises aforesaid, and the said corporation being subjected to the United States of America in the amount aforesaid by reason of the tax imposed by the aforesaid Act of Congress, and the said defendants, then and there well knowing that the gross income and the net income derived, had, and received by the said corporation during the calendar year 1933 were as aforesaid, on, to wit, March 15, 1934, at Chicago aforesaid, in the District aforesaid, unlawfully did wilfully and knowingly attempt to evade and defeat a large part, to wit, \$9,678.02, of the said tax upon the said net income of the said corporation for the calendar year 1933, and as a means of so unlawfully, wilfully, and knowingly attempting to evade and defeat said tax, did, on, to wit, March 15, 1934, at Chicago aforesaid, in the State aforesaid, prepare and cause to be prepared and duly sworn to, an income tax return for said corporation for said calendar year 1933, and thereafter

and on, to wit, March 15, 1934, at Chicago aforesaid, in the State and District aforesaid, did file and cause to be filed with the said Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, said income tax return for the calendar year 1933, prepared and sworn to as aforesaid, stating specifically therein the items of gross income of the corporation for the said calendar year 1933 to have been the sum of \$119,960.96, and no more, derived as follows:

Gross Profit from Sales\$119,960.96

and stating specifically the items of deductions (in addition to the deductions taken in computing gross income as aforesaid) allowed by the Act of Congress aforesaid for the calendar year 1933, to have been the sum of \$93,326.81, on account of the following:

| | |
|---------------------------------|-----------|
| Rent on Business Property | \$ 562.50 |
| Interest | 89.55 |
| Taxes | 300.00 |
| Depreciation | 1,821.00 |
| Salaries and Wages | 12,757.56 |
| Commissions | 54,537.65 |
| Other Expenses | 23,258.55 |

Total Deductions\$93,326.81

and stating therein no other items of deductions, and stating specifically the net income, to wit, the said gross income less the said deductions allowed by law, for the calendar year 1933 to have been the sum of \$26,634.15, and showing the total tax due and payable by said corporation thereon to have been \$3,662.20, and paid and caused to be paid by the said corporation to the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, the sum of \$3,662.20, and furthermore, neither the defendants nor the said corporation has ever made to the said Collector of Internal Revenue any other income tax return for the said calendar year 1933, for and in behalf of said corporation, stating specifically the items of its gross income and the deductions and credits allowed by law, and neither the defendants nor the said corporation has ever made any other payment or payments to said Collector of Internal Revenue or to any other proper officer of the United States, of any sums of money on account of said tax debt of said corporation for the said calendar year 1933.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

Second Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that:

Moses L. Annenberg, otherwise known as Moses Louis Annenberg and M. L. Annenberg, late of the City of Philadelphia, State of Pennsylvania:

William Molasky, late of the City of St. Louis, State of Missouri;

Jules Taylor, otherwise known as J. Taylor, late of the City and State of New York;

Arnold W. Kruse, otherwise known as A. W. Kruse, late of the City of Chicago, State of Illinois;

Lester A. Kruse, otherwise known as Lester Kruse, late of the City of Chicago, State of Illinois;

James M. Ragen, otherwise known as J. M. Ragen, James M. Ragen, Sr., and J. M. Ragen, Sr., late of the City of Chicago, State of Illinois;

James M. Ragen, Jr., alias James Rogers, otherwise known as J. M. Ragen, Jr., late of the City of Chicago, State of Illinois;

Herbert S. Kamin, otherwise known as H. S. Kamin, late of the City of Chicago, State of Illinois;
and

The Consensus Publishing Company, an Illinois corporation;

hereinafter in this indictment sometimes called the defendants, on, to wit, March 15, 1935, at Chicago, in said State, and in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, unlawfully did wilfully and knowingly attempt to evade and defeat a large part, to wit, \$10,971.90, of a tax imposed on the net income of the Consensus Publishing Company, a corporation, for the calendar year 1934, which tax was imposed by an Act of Congress approved May 10, 1934, entitled "An Act To provide revenue, equalize taxation, and for other purposes," which Act of Congress is known as the Revenue Act of 1934, which said unlawful and wilful attempt to defeat and evade said tax was by the means and in the manner following, that is to say:

That the said Consensus Publishing Company, hereinafter sometimes called the corporation, during the calendar year 1934, and up to and including March 15, 1935, was a corporation existing and doing business under and by virtue of the laws of the State of Illinois, engaged in the business of publishing and distributing information concerning horse races and kindred data, and more specifically the printing and selling of so-called "Run Down Sheets" to a class of persons known as "bookmakers," with its principal place of business at Chicago aforesaid, in said State and within the First Internal Revenue Collection District of Illinois, said corporation also maintaining divers other offices for the conduct of its business in the Cities of St. Louis, State of Missouri, and Cincinnati, State of Ohio, and was not a corporation exempt from taxation under the provisions of the Act of Congress aforesaid; and the said defendant, William Molasky, was at all times hereinafter set forth and during the calendar year 1934, the duly elected and acting president and employee of said corporation; that the regular annual accounting period of the said corporation was on the basis of the calendar year and the said corporation was then and there required by the Act of Congress aforesaid and pursuant to rules and regulations made and prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury of the United States of America, as authorized in and by virtue of the Act of Congress aforesaid, to make to the Collector of Internal Revenue for the said Collection District, a return for the calendar year 1934, after the close of the calendar year 1934, and on or before March 15, 1935, stating specifically the items of its gross income and the deductions and credits allowed by Title I (Income Tax) of the said Act of Congress, duly sworn to, and by reason of the fact, which the said grand jurors upon their oaths charge to be a fact, that during the said calendar year 1934 the said corporation had and derived a gross income (exclusive of items which, under said Revenue Act shall not be included in gross income) of, to wit, \$129,665.78, derived as follows, that is to say:

Gross Profit\$129,665.78

and that during the said calendar year 1934 the said corporation was entitled to and allowed by the provisions of said Title I of said Act of Congress deductions (in

addition to deductions allowed in computing the gross income as aforesaid) in the sum of, to wit, \$40,227.84, on account of the following:

| | |
|-----------------------------------|-----------|
| Rent from Business Property | \$ 650.00 |
| Interest | 347.82 |
| Taxes | 293.00 |
| Depreciation | 1,214.00 |
| Salaries and Wages | 12,708.56 |
| Other Deductions (Expenses) | 25,014.46 |

Total Deductions\$40,227.84

7 and the said corporation had, derived, and received a net income for said calendar year 1934, to wit, the gross income less the deductions allowed by law of, to wit, \$89,437.94, upon which said net income of said corporation for said calendar year 1934, an income tax of, to wit, \$14,995.94, under the Act of Congress aforesaid, became and was due by the corporation, on, to wit, March 15, 1935, to the United States of America, one-fourth of the amount of which at least should then and there have been paid by the said corporation to the said Collector of Internal Revenue for the said First Internal Revenue Collection District of Illinois;

That the said defendants, knowing the premises aforesaid, and the said corporation being indebted to the United States of America in the amount aforesaid by reason of the tax imposed by the aforesaid Act of Congress, and the said defendants, then and there well knowing that the gross income and the net income derived, had, and received by the said corporation during the calendar year 1934 were as aforesaid, on, to wit, March 15, 1935, at Chicago aforesaid, in the district aforesaid, unlawfully did wilfully and knowingly attempt to evade and defeat a large part, to wit, \$10,971.90, of the said tax upon the said net income of the said corporation for the calendar year 1934, and as a means of so unlawfully, wilfully, and knowingly attempting to evade and defeat said tax, did, on, to wit, March 15, 1935, at Chicago aforesaid, in the State aforesaid, prepare and cause to be prepared and duly sworn to, an income tax return for said corporation for said calendar year 1934, and thereafter and on, to wit, March 15, 1935, at Chicago aforesaid, in the State and District aforesaid, did file and cause to be filed with the said Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, said income tax return for the calendar year 1934, pre-

pared and sworn to as aforesaid, stating specifically therein the items of gross income of the corporation for the said calendar year 1934 to have been the sum of \$129,665.78, and no more, derived as follows:

| | |
|--------------------|--------------|
| Gross Profit | \$129,665.78 |
|--------------------|--------------|

and stating specifically the items of deductions (in addition to the deductions taken in computing gross income as aforesaid) allowed by the Act of Congress aforesaid for the calendar year 1934, to have been the sum of \$100,400.07, on account of the following:

| | |
|--------------------------------|-----------|
| Rent on Business Property..... | \$ 650.00 |
| Interest | 347.82 |
| Taxes | 293.00 |
| Depreciation | 1,214.00 |
| Salaries and Wages..... | 12,708.56 |
| Commissions | 60,172.23 |
| Other Deductions | 25,014.46 |

| | |
|-----------------------|--------------|
| Total Deductions..... | \$100,400.07 |
|-----------------------|--------------|

and stating therein no other items of deductions, and stating specifically the net income, to wit, the said gross income less the said deductions allowed by law, for the calendar year 1934 to have been the sum of \$29,265.71, and showing the total tax due and payable by said corporation thereon to have been \$4,024.04, and paid and caused to be paid by the said corporation to the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, the sum of \$4,024.04, and furthermore, neither the defendants nor the said corporation has ever made to the said Collector of Internal Revenue any other income tax return for the said calendar year 1934, for and in behalf of said corporation, stating specifically the items of its gross income and the deductions and credits allowed by law, and neither the defendants nor the said corporation has ever made any other payment or payments to said Collector of Internal Revenue or to any other proper officer of the United States, of any sums of money on account of said tax debt of said corporation for the said calendar year 1934: Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

Third Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that:

Moses L. Annenberg, otherwise known as Moses Louis Annenberg and M. L. Annenberg, late of the City of Philadelphia, State of Pennsylvania;

William Molasky, late of the City of St. Louis, State of Missouri;

Jules Taylor, otherwise known as J. Taylor, late of the City and State of New York;

Arnold W. Kruse, otherwise known as A. W. Kruse, late of the City of Chicago, State of Illinois;

Lester A. Kruse, otherwise known as Lester Kruse, late of the City of Chicago, State of Illinois;

James M. Ragen, otherwise known as J. M. Ragen, James M. Ragen, Sr., and J. M. Ragen, Sr., late of the City of Chicago, State of Illinois;

James M. Ragen, Jr., alias James Rogers, otherwise known as J. M. Ragen, Jr., late of the City of Chicago, State of Illinois;

8 Herbert S. Kamin, otherwise known as H. S. Kamin, late of the City of Chicago; State of Illinois; and

The Consensus Publishing Company, an Illinois corporation;

hereinafter in this indictment sometimes called the defendants, on, to wit, March 16, 1936, at Chicago, in said State, and in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, unlawfully did wilfully and knowingly attempt to evade and defeat a large part, to wit, \$14,383.83, of a tax imposed on the net income of the Consensus Publishing Company, a corporation, for the calendar year 1935, which tax was imposed by an Act of Congress approved May 10, 1934, as amended, entitled "An Act to provide revenue, equalize taxation, and for other purposes," which Act of Congress is known as the Revenue Act of 1934, which said unlawful and wilful attempt to defeat and evade said tax was by the means and in the manner following, that is to say:

That the said Consensus Publishing Company, hereinafter sometimes called the corporation, during the calendar year 1935, and up to and including March 15, 1936, was a corporation existing and doing business under and by virtue of the laws of the State of Illinois, engaged in the business of publishing and distributing information concerning horse races and kindred data, and more specifically the

printing and selling of so-called "Run Down Sheets" to a class of persons known as "bookmakers," with its principal place of business at Chicago aforesaid, in said State and within the First Internal Revenue Collection District of Illinois, said corporation also maintaining divers other offices for the conduct of its business in the Cities of St. Louis, State of Missouri, and Cincinnati, State of Ohio, and was not a corporation exempt from taxation under the provisions of the Act of Congress aforesaid; and the said defendant, William Molasky, was at all times hereinafter set forth and during the calendar year 1935, the duly elected and acting president and employee of said corporation; that the regular annual accounting period of the said corporation was on the basis of the calendar year and the said corporation was then and there required by the Act of Congress aforesaid and pursuant to rules and regulations made and prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury of the United States of America, as authorized in and by virtue of the Act of Congress aforesaid, to make to the Collector of Internal Revenue for the said Collection District, a return for the calendar year 1935, after the close of the calendar year 1935, and on or before March 15, 1936, stating specifically the items of its gross income and the deductions and credits allowed by Title I (Income Tax) of the said Act of Congress, duly sworn to, and by reason of the fact, which the said grand jurors upon their oaths charge to be a fact, that during the said calendar year 1935, the said corporation had and derived a gross income (exclusive of items which, under said Revenue Act shall not be included in gross income) of, to wit, \$149,881.61, derived as follows, that is to say:

• Gross Receipts\$149,881.61

and that during the said calendar year 1935 the said corporation was entitled to and allowed by the provisions of said Title I of said Act of Congress deductions (in addition to deductions allowed in computing the gross income as aforesaid) in the sum of, to wit, \$37,374.32, on account of the following:

| | |
|--------------------------------|-----------|
| Rent on Business Property..... | \$ 650.00 |
| Taxes | 418.45 |
| Depreciation | 1,214.00 |
| Salaries and Wages..... | 10,504.56 |
| Other Deductions | 24,587.31 |

Total Deductions.....\$37,374.32

and the said corporation had, derived, and received a net income for said calendar year 1935, to wit, the gross income less the deductions allowed by law of, to wit, \$112,507.29, upon which said net income of said corporation for said calendar year 1935, an income tax of, to wit, \$19,318.39, under the Act of Congress aforesaid, became and was due by the corporation, on, to wit, March 15, 1936, to the United States of America, one-fourth of the amount of which at least should then and there have been paid by the said corporation to the said Collector of Internal Revenue for the said First Internal Revenue Collection District of Illinois;

That the said defendants, knowing the premises aforesaid, and the said corporation being indebted to the United States of America in the amount aforesaid by reason of the tax imposed by the aforesaid Act of Congress, and the said defendants, then and there well knowing that the gross income and the net income derived, had, and received by the said corporation during the calendar year 1935 were as aforesaid, on, to wit, March 16, 1936, at Chicago, aforesaid, in the District aforesaid, unlawfully did wilfully and knowingly attempt to evade and defeat a large part, to wit, \$14,383.83, of the said tax upon the said net income of the said corporation for the calendar year 1935, and as a means

of so unlawfully, wilfully and knowingly attempting to evade and defeat said tax, did, on, to wit, January 15,

1936, at Chicago aforesaid, in the State aforesaid, prepare and cause to be prepared and duly sworn to, an income tax return for said corporation for said calendar year 1935, and thereafter and on, to wit, March 16, 1936 at Chicago aforesaid, in the State and District aforesaid, did file and cause to be filed with the said Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, said income tax return for the calendar year 1935, prepared and sworn to as aforesaid, stating specifically therein the items of gross income of the corporation for the said calendar year 1935 to have been the sum of \$149,881.61, and no more, derived as follows:

Gross Receipts\$149,881.61

and stating specifically the items of deductions (in addition to the deductions taken in computing gross income as aforesaid) allowed by the Act of Congress aforesaid for the calendar year 1935, to have been the sum of \$114,088.07, on account of the following:

| | |
|--------------------------------|---------------------|
| Rent on Business Property..... | \$ 650.00 |
| Taxes | 418.45 |
| Depreciation | 1,214.00 |
| Salaries and Wages..... | 10,504.56 |
| Commissions | 76,713.75 |
| Other Deductions | 24,587.31 |
| Total Deductions..... | <u>\$114,088.07</u> |

and stating therein no other items of deductions, and stating specifically the net income, to wit, the said gross income less the said deductions allowed by law, for the calendar year 1935 to have been the sum of \$35,793.54, and showing the total tax due and payable by said corporation thereon to have been \$4,934.56, and paid and caused to be paid by the said corporation to the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, the sum of \$4,934.56, and furthermore, neither the defendants nor the said corporation has ever made to the said Collector of Internal Revenue any other income tax return for the said calendar year 1935, for and in behalf of said corporation, stating specifically the items of its gross income and the deductions and credits allowed by law, and neither the defendants nor the said corporation has ever made any other payment or payments to said Collector of Internal Revenue or to any other proper officer of the United States, of any sums of money on account of said tax debt of said corporation for the said calendar year 1935:

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

Fourth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that:

Moses L. Annenberg, otherwise known as Moses Louis Annenberg and M. L. Annenberg, late of the City of Philadelphia, State of Pennsylvania;

William Molasky, late of the City of St. Louis, State of Missouri;

Jules Taylor, otherwise known as J. Taylor, late of the City and State of New York;

Arnold W. Kruse, otherwise known as A. W. Kruse, late of the City of Chicago, State of Illinois;

Lester A. Kruse, otherwise known as Lester Kruse, late of the City of Chicago, State of Illinois;

James M. Ragen, otherwise known as J. M. Ragen, James M. Ragen, Sr., and J. M. Ragen, Sr., late of the City of Chicago, State of Illinois;

James M. Ragen, Jr., alias James Rogers, otherwise known as J. M. Ragen, Jr., late of the City of Chicago, State of Illinois;

Herbert S. Kamin, otherwise known as H. S. Kamin, late of the City of Chicago, State of Illinois; and

The Consensus Publishing Company, an Illinois corporation;

hereinafter in this indictment sometimes called the defendants, on, to wit, March 15, 1937, at Chicago, in said State, and in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, unlawfully did wilfully and knowingly attempt to evade and defeat a large part, to wit, \$17,963.37, of a tax imposed on the net income of the Consensus Publishing Company, a corporation, for the calendar year 1936, which tax was imposed by an Act of Congress approved June 22, 1936, entitled "An Act To provide revenue, equalize taxation, and for other purposes," which Act of Congress is known as the Revenue Act of 1936, which said unlawful and wilful attempt to defeat and evade said tax was by the means and in the manner following, that is to say:

That the said Consensus Publishing Company, hereinafter sometimes called the corporation, during the calendar year 1936, and up to and including March 15, 1937, was a corporation existing and doing business under and by virtue of the laws of the State of Illinois, engaged in the business of publishing and distributing information concerning horse races and kindred data, and more specifically the printing and selling of so-called "Run Down

Shee's" to a class of persons known as "bookmakers,"
10 with its principal place of business at Chicago aforesaid, in said State and within the First Internal Revenue Collection District of Illinois, said corporation also maintaining divers other offices for the conduct of its business in the City of St. Louis, State of Missouri, and Cincinnati, State of Ohio, and was not a corporation exempt from taxation under the provisions of the Act of Congress aforesaid; and the said defendant, William Molasky, was at all times hereinafter set forth and during the calendar year 1936, the duly elected and acting pres-

ident and employee of said corporation; that the regular annual accounting period of the said corporation was on the basis of the calendar year and the said corporation was then and there required by the Act of Congress aforesaid and pursuant to rules and regulations made and prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury of the United States of America, as authorized in and by virtue of the Act of Congress aforesaid, to make to the Collector of Internal Revenue for the said Collection District, a return for the calendar year 1936, after the close of the calendar year 1936, and on or before March 15, 1937, stating specifically the items of its gross income and the deductions and credits allowed by Title I (Income Tax) of the said Act of Congress, duly sworn to, and by reason of the fact, which the said grand jurors upon their oaths charge to be a fact, that during the said calendar year 1936 the said corporation had and derived a gross income (exclusive of items which, under said Revenue Act shall not be included in gross income) of, to wit, \$212,562.00, derived as follows, that is to say:

Gross Receipts\$212,562.00

and that during the said calendar year 1936 the said corporation was entitled to and allowed by the provisions of said Title I of said Act of Congress deductions (in addition to deductions allowed in computing the gross income as aforesaid) in the sum of, to wit, \$37,854.89, on account of the following:

| | |
|--------------------------------|-----------|
| Rent on Business Property..... | \$ 662.50 |
| Telephone and Telegraph..... | 371.43 |
| Insurance | 113.93 |
| Taxes Paid | 2,417.44 |
| Delivery and Mailing..... | 9,090.52 |
| Printing | 5,300.00 |
| Depreciation | 1,214.00 |
| Paper | 1,594.01 |
| Mechanical Supplies | 172.04 |
| Salaries and Wages..... | 8,816.00 |
| News Privileges | 5,000.00 |
| Miscellaneous | 3,103.02 |

Total Deductions.....\$37,854.89

and the said corporation had, derived, and received a net income for said calendar year 1936, to wit, the gross income less the deductions allowed by law of, to wit, \$174,707.11,

upon which said net income of said corporation for said calendar year 1936, an income tax of, to wit, \$25,046.07, under the Act of Congress aforesaid, became and was due by the corporation, on, to wit, March 15, 1937, to the United States of America, one-fourth of the amount of which at least should then and there have been paid by the said corporation to the said Collector of Internal Revenue for the said First Internal Revenue Collection District of Illinois;

That the said defendants, knowing the premises aforesaid, and the said corporation being indebted to the United States of America in the amount aforesaid by reason of the tax imposed by the aforesaid Act of Congress, and the said defendants, then and there well knowing that the gross income and the net income derived, had, and received by the said corporation during the calendar year 1936 were as aforesaid, on, to wit, March 15, 1937, at Chicago, aforesaid, in the District aforesaid, unlawfully did wilfully and knowingly attempt to evade and defeat a large part, to wit, \$17,963.37, of the said tax upon the said net income of the said corporation for the calendar year 1936, and as a means of so unlawfully, wilfully and knowingly attempting to evade and defeat said tax, did, on, to wit, March 15, 1937, at Chicago aforesaid, in the State aforesaid, prepare and cause to be prepared and duly sworn to, an income tax return for said corporation for said calendar year 1936, and thereafter and on, to wit, March 15, 1937, at Chicago aforesaid, in the State and District aforesaid, did file and cause to be filed with the said Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, said income tax return for the calendar year 1936, prepared and sworn to as aforesaid, stating specifically therein the items of gross income of the corporation for the said calendar year 1936 to have been the sum of \$212,562.00, and no more, derived as follows:

Gross Receipts\$212,562.00

and stating specifically the items of deductions (in addition to the deductions taken in computing gross income as aforesaid) allowed by the Act of Congress aforesaid for the calendar year 1936, to have been the sum of \$157,610.67, on account of the following:

| | | |
|----|--------------------------------|--------------|
| 11 | Commissions | \$119,755.78 |
| | Rent on Business Property..... | 662.50 |
| | Telephone and Telegraph | 371.43 |
| | Insurance | 113.93 |
| | Taxes Paid | 2,417.44 |
| | Delivery and Mailing..... | 9,090.52 |
| | Printing | 5,300.00 |
| | Depreciation | 1,214.00 |
| | Paper | 1,594.01 |
| | Mechanical Supplies | 172.04 |
| | Salaries and Wages | 8,816.00 |
| | News Privileges | 5,000.00 |
| | Miscellaneous | 3,103.02 |
| | Total Deductions | \$157,610.67 |

and stating therein no other items of deductions, and stating specifically the net income, to wit, the said gross income less the said deductions allowed by law, for the calendar year 1936 to have been the sum of \$54,951.33, and showing the total tax due and payable by said corporation thereon to have been \$7,082.70, and paid and caused to be paid by the said corporation to the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, the sum of \$7,082.70, and furthermore, neither the defendants nor the said corporation has ever made to the said Collector of Internal Revenue any other income tax return for the said calendar year 1936, for and in behalf of said corporation, stating specifically the items of its gross income and the deductions and credits allowed by law, and neither the defendants nor the said corporation has ever made any other payment or payments to said Collector of Internal Revenue or to any other proper officer of the United States, of any sums of money on account of said tax debt of said corporation for the said calendar year 1936:

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

Fifth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that:
Moses L. Annenberg, otherwise known as Moses Louis

Annenberg and M. L. Annenberg, late of the City of Philadelphia, State of Pennsylvania;
William Molasky, late of the City of St. Louis, State of Missouri;
Jules Taylor, otherwise known as J. Taylor, late of the City and State of New York;
Arnold W. Kruse, otherwise known as A. W. Kruse, late of the City of Chicago, State of Illinois;
Lester A. Kruse, otherwise known as Lester Kruse, late of the City of Chicago, State of Illinois;
~~James M. Ragen~~, otherwise known as J. M. Ragen, James M. Ragen, Sr., and J. M. Ragen, Sr., late of the City of Chicago, State of Illinois;
James M. Ragen, Jr., alias James Rogers, otherwise known as J. M. Ragen, Jr., late of the City of Chicago, State of Illinois;
Herbert S. Kamin, otherwise known as H. S. Kamin, late of the City of Chicago, State of Illinois;

and

The Consensus Publishing Company, an Illinois corporation;

whose full and true names are to the grand jurors unknown except as aforesaid, hereinafter in this indictment sometimes called the defendants, and other persons to the grand jurors unknown, throughout, and at various times during the period extending from January 1, 1929, up to and including the date of the return of this indictment, at Chicago, State of Illinois, and in the Eastern Division of the Northern District of Illinois, and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did combine, conspire, confederate and agree together and with each other, and with divers other persons to the grand jurors unknown, to wilfully attempt to evade and defeat the payment of a large part, to wit, \$77,883.53, of taxes imposed upon the net income of the Consensus Publishing Company, a corporation, for the calendar years 1929 to 1936, both dates inclusive, which taxes were to become and did become due to the United States of America from said corporation and which taxes were imposed by Acts of Congress approved May 29, 1928, June 6, 1932, May 10, 1934, August 30, 1935, and June 22, 1936, which Acts of Congress are known as the Revenue Acts of 1928, 1932, 1934, 1935 and 1936, respectively, and which said conspiracy was one for wilfully attempting to evade and de-

feat said income taxes by the means and in the manner following, that is to say:

That the said Consensus Publishing Company, hereinafter sometimes called the corporation, during the calendar years 1929 to 1936, both dates inclusive, and during all of the times herein mentioned, was a corporation organized, existing and doing business under, and by virtue of, the laws of the State of Illinois, engaged in the business of publishing and distributing information concerning horse races and kindred data, and more specifically the printing and selling of so-called "Run Down Sheets" to a class of persons known as "bookmakers," with its principal place of business at Chicago aforesaid, in said State and within the First Internal Revenue Collection District of the United States for the State of Illinois, said corporation also maintaining divers other offices for the conduct of its business in the Cities of St. Louis, State of Missouri, and Cincinnati, State of Ohio, and was not a corporation exempt from taxation under the provisions of the Acts of Congress aforesaid; and the said defendant, William Molasky, was at all times hereinafter set forth and during the calendar years 1929 to 1936, both dates inclusive, the duly elected and acting president and employee of said corporation; that the regular annual accounting period of the said corporation was on the basis of the calendar year and not on the basis of a fiscal year; and the said corporation was then and there required by the Acts of Congress, aforesaid, and pursuant to rules and regulations made and prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury of the United States of America, as authorized in and by virtue of the Acts of Congress aforesaid, to make to the Collector of Internal Revenue for the said Collection District, returns for the calendar years 1929 to 1936, both dates inclusive, after the close of each of the respective calendar years, and on or before March 15th of the next succeeding year, stating specifically the items of its gross income and the deductions and credits allowed by the said Acts of Congress, duly sworn to, and by reason of the fact, which the said grand jurors upon their oaths charge to be a fact, that during the said calendar years 1929 to 1936, both dates inclusive, the said corporation had, derived and received gross income, and was entitled to and allowed by the provisions of the said Acts of Congress deductions (in

addition to deductions allowed in computing the gross income as aforesaid), and had derived and received net income for the respective calendar years as follows, to wit:

| Year | Gross Income | Deductions | Net Income |
|------|--------------|-------------|--------------|
| 1929 | \$ 29,469.64 | \$12,479.52 | \$ 16,990.12 |
| 1930 | 132,075.47 | 47,225.84 | 84,849.63 |
| 1931 | 139,760.60 | 39,009.40 | 100,751.20 |
| 1932 | 125,526.94 | 40,040.48 | 85,486.46 |
| 1933 | 119,960.96 | 38,789.16 | 81,171.80 |
| 1934 | 129,635.78 | 40,227.84 | 89,407.94 |
| 1935 | 149,881.61 | 37,374.32 | 112,507.29 |
| 1936 | 212,562.00 | 37,854.89 | 174,707.11 |

upon which said net income of said corporation for said calendar years respectively, as aforesaid, income taxes, under the Acts of Congress aforesaid, became due and were due by the corporation, on, to wit, March 15th of each respective succeeding year to the United States of America, one-fourth of the amount of which at least should then and there have been paid by the said corporation to the said Collector of Internal Revenue for the said First Internal Revenue Collection District of Illinois, and which income taxes for the respective years as aforesaid, due and payable as aforesaid, were as follows, to wit:

| Calendar Year | Income Tax Due |
|---------------|----------------|
| 1929 | \$ 1,678.81 |
| 1930 | 10,181.96 |
| 1931 | 12,090.14 |
| 1932 | 11,754.39 |
| 1933 | 13,340.22 |
| 1934 | 14,995.94 |
| 1935 | 19,318.39 |
| 1936 | 25,046.07 |

That the said defendants, in order to deceive such Internal Revenue officers and employees of the United States as should be charged with the assessment and collection of such taxes, and such officers and employees of the United States as should be authorized and required to examine and audit the account books and records of said corporation in checking and verifying its Internal Revenue tax returns on account of its income taxes for the said calendar years 1929 to 1936, both dates inclusive, to be filed with the Collector of Internal Revenue for said Collection District, as required by law, and in order to prepare the way for making false and fraudulent returns to said Collector for

said calendar years, showing greatly less income taxes due from said corporation for the said calendar years, and for failing to pay to said Collector, in accordance with such false and fraudulent returns, the true and correct taxes on the net income of said corporation, would, and did, according to said unlawful conspiracy, combination, confederation and agreement, at all of the times in this indictment mentioned, dominate and control the said corporation, and would, and did, in each of said calendar years 1929 to 1936, both dates inclusive, cause the said corporation, through themselves, the defendants, and divers other persons, as officers, agents and directors of the said corporation, to enter into and agree upon certain so-called "Employment Contracts" by and between the corporation and divers of the defendants, by virtue of the terms of which said "Employment Contracts" the corporation would be and was caused to contract for and engage the services of
13 divers of the defendants in an executive capacity and whereby the corporation would, and did, agree to pay the said defendants large percentages of the net profits of the corporation as commissions, wages and salaries;

And, as a further part of the said conspiracy, they the defendants, would, and did, cause the corporation, in accordance with the said so-called "Employment Contracts," to pay the said large percentages of net profits to them, the defendants, as the said profits accrued and at the end of each and every week which should elapse during the terms of the said contracts;

It was a further part of the said conspiracy that the defendants would, and did, cause to be shown on the books, accounts and records of said corporation from which said false and fraudulent returns were to be prepared and which books, accounts and records were to be exhibited to such officers and employees of the United States who might thereafter be authorized and required to examine and audit the same, the said so-called "Employment Contracts" and payments of money thereunder, whereby and by virtue of which it would be and was made to appear that for each of the said respective calendar years as aforesaid, large sums of money had been due and were paid by the said corporation to the said defendants as commissions and salary for services rendered in an executive capacity to said corporation for each of the said respective calendar years, which said large sums, so to be paid as aforesaid, would, in each of said respective calendar years, be fraudulently

and falsely claimed and deducted as a proper deduction from the gross income of the said corporation and were consequently to show the taxable net income of said corporation in carrying on its said business during said respective calendar years less by said amounts than it actually was, and which said amounts so to be contracted for and paid as aforesaid and to be deducted as aforesaid, aggregated in each of the respective calendar years as aforesaid, as follows, to wit:

| Year | Sums Paid Under "Employment Contracts" |
|------------|---|
| 1929 | \$ 10,761.44 |
| 1930 | 62,961.22 |
| 1931 | 64,790.80 |
| 1932 | 57,254.57 |
| 1933 | 54,537.65 |
| 1934 | 60,172.23 |
| 1935 | 76,713.75 |
| 1936 | 119,755.78 |

whereas, in truth and in fact, as the said defendants and each of them then and there well knew, the said defendants would not in fact be, nor were they, employed in an executive capacity or in any capacity whatsoever by the said corporation by virtue of said "Employment Contracts" during the said calendar years 1929 to 1936, both dates inclusive, nor would they, nor did they, nor any of them, nor any one else for them, render any services to the said corporation by virtue of the aforementioned "Employment Contracts," but that in fact they, the said defendants, would be, and were, owners and holders of beneficial interests for themselves and others in the said corporation and all of the moneys to be paid and which were paid to them, and each of them, by virtue of the said so-called "Employment Contracts" as aforesaid, would be and were, in truth and in fact, distributions of profits and dividends from earnings of the said corporation, and taxable to said corporation as net income of the said corporation, and the said "Employment Contracts," books, records and accounts reflecting said so-called employment, and all of said payments made thereunder, would be, and were, a mere sham, device and pretense to evade and defeat the payment of income taxes due and to become due from the said corporation of the United States of America.

And the said defendants would, when required by law so

to do, file and cause to be filed with the said Collector of Internal Revenue for the said Collection District, income tax returns for the said respective calendar years 1929 to 1936, both dates inclusive, for said corporation, which said income tax returns would contain false and fraudulent statements and items pertaining to the income and profits of the said corporation, especially to the items showing deductions from gross income by virtue of commissions paid, by showing as items of deductions from gross income the commissions and payments so to be paid and caused to be paid as aforesaid, and thereby show on said returns a much less net income for said calendar years to said corporation than in truth and in fact it would, and did, have for the said years, and consequently a much less tax due by said corporation and specifically, for each of said respective calendar years, the amounts following, to wit:

| Calendar | | Year | Gross Income | Deductions | Net Income | Tax Due |
|----------|--|------|--------------|--------------|-------------|-----------|
| | | 1929 | \$ 29,469.64 | \$ 23,240.96 | \$ 6,228.68 | \$ 355.15 |
| | | 1930 | 132,075.47 | 110,187.06 | 21,888.41 | 2,266.61 |
| | | 1931 | 139,760.60 | 103,800.20 | 35,960.40 | 4,315.25 |
| | | 1932 | 125,526.94 | 97,295.05 | 28,231.89 | 3,881.88 |
| | | 1933 | 119,960.96 | 93,326.81 | 26,634.15 | 3,662.20 |
| 14 | | 1934 | 129,665.78 | 100,400.07 | 29,265.71 | 4,024.00 |
| | | 1935 | 149,881.61 | 114,088.07 | 35,793.54 | 4,934.56 |
| | | 1936 | 212,562.00 | 157,610.67 | 54,951.33 | 7,082.70 |

although the said corporation was, during the said calendar years, abundantly able to pay all taxes due from it to the United States, and the said defendants would cause it not to pay the true and correct income taxes for said corporation on account of its business for the said calendar years, and thereby were to evade and defeat the payment to the United States of the said taxes in the aggregate of, to wit, \$77,883.53, imposed by law on said corporation for the said calendar years 1929 to 1936, both dates inclusive.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that, in pursuance of said unlawful and felonious conspiracy, combination, confederation and agreement, and to effect the objects of the same, the said defendants, well knowing all of the facts aforesaid, at Chicago, within the Eastern Division of the Northern District of Illinois and within the jurisdiction of this Court, and elsewhere, at various times during the period of time herein mentioned, did do certain acts, among others, to effectuate said conspiracy, that is to say:

Overt Acts.

1. In pursuance of said conspiracy and to effect the objects thereof, the defendant, William Molasky, on, to wit, January 2, 1930, at, to wit, Chicago, Illinois, did affix his signature to certain "Employment Contract" for The Consensus Publishing Company.

2 to 7. In pursuance of said conspiracy and to effect the objects thereof, the defendant, William Molasky, on, to wit, the 2nd day of January, 1931, and on the 2nd day of January of each succeeding year thereafter to and including the year 1936, did on said dates, respectively, and at, to wit, Chicago, Illinois, affix his signature to certain "Employment Contracts" for The Consensus Publishing Company, each of said affixment of signatures being charged herein as a separate overt act in furtherance of the said conspiracy, as aforesaid.

8 to 10. In pursuance of said conspiracy and to effect the objects thereof, the defendant, Arnold W. Kruse, at, to wit, Chicago, Illinois, on, to wit, January 2, 1930, and on January 2, 1931, and on January 2, 1932, did, on said respective dates, affix and cause to be affixed his signature to certain "Employment Contracts" with The Consensus Publishing Company, each of said affixment signatures being charged herein as a separate overt act in furtherance of the said conspiracy, as aforesaid.

11. In pursuance of said conspiracy and to effect the objects thereof, the defendant, James M. Ragen, at, to wit, Chicago, Illinois, on, to wit, January 2, 1931, did affix his signature to a certain "Employment Contract" with The Consensus Publishing Company.

12. In pursuance of said conspiracy and to effect the objects thereof, the defendant, Lester A. Kruse, at, to wit, Chicago, Illinois, on, to wit, January 2, 1936, did affix his signature to a certain "Employment Contract" with The Consensus Publishing Company.

13. In pursuance of said conspiracy and to effect the objects thereof, the defendant, James M. Ragen, Jr., at, to wit, Chicago, Illinois, on, to wit, January 2, 1936, did affix his signature to a certain "Employment Contract" with The Consensus Publishing Company.

14 to 16. In pursuance of said conspiracy and to effect the objects thereof, the defendants, William Molasky, James M. Ragen, Jr., and Herbert S. Kamin, at, to wit,

Chicago, Illinois, on, to wit, January 2, 1936, did affix their signatures to a page of the books and records of The Consensus Publishing Company, each of said affixment of signatures being charged herein as a separate overt act in furtherance of said conspiracy, as aforesaid.

17 and 18. In pursuance of said conspiracy and to effect the objects thereof, the defendants, William Molasky and James M. Ragen, Jr., at, to wit, Chicago, Illinois, on, to wit, January 2, 1933, did affix their signatures to a page of the books and records of The Consensus Publishing Company, each of said affixment of signatures being charged herein as a separate overt act in furtherance of said conspiracy, as aforesaid.

19 and 20. In pursuance of said conspiracy and to effect the objects thereof, the defendants, William Molasky and James M. Ragen, Jr., at, to wit, Chicago, Illinois, on, to wit, January 2, 1934, did affix their signatures to a page of the books and records of The Consensus Publishing Company, each of said affixment of signatures being charged herein as a separate overt act in furtherance of said conspiracy, as aforesaid.

21 and 22. In pursuance of said conspiracy and to effect the objects thereof, the defendants, William Molasky and Jules Taylor, at, to wit, Chicago, Illinois, on, to wit, January 2, 1933, did affix their signatures to a page of the books and records of The Consensus Publishing Company, each of said affixment of signatures being charged herein as a separate overt act in furtherance of said conspiracy, as aforesaid.

15 23. In pursuance of said conspiracy and to effect the objects thereof, the defendants, at, to wit, Chicago, Illinois, on, to wit, March 15, 1930, prepared and caused to be prepared an income tax return for The Consensus Publishing Company.

24. In pursuance of said conspiracy and to effect the objects thereof, the defendant, Arnold W. Kruse, at, to wit, Chicago, Illinois, on, to wit, March 14, 1931, signed, under oath, an income tax return for The Consensus Publishing Company.

25. In pursuance of said conspiracy and to effect the objects thereof, the defendant, Arnold W. Kruse, at, to wit, Chicago, Illinois, on, to wit, March 15, 1932, signed, under oath, an income tax return for The Consensus Publishing Company.

26. In pursuance of said conspiracy and to effect the objects thereof, the defendant, Arnold W. Kruse, at, to wit, Chicago, Illinois, on, to wit, March 15, 1933, signed, under oath, an income tax return for The Consensus Publishing Company.

27. In pursuance of said conspiracy and to effect the objects thereof, the defendant, Arnold W. Kruse, at, to wit, Chicago, Illinois, on, to wit, March 15, 1934, signed, under oath, an income tax return for The Consensus Publishing Company.

28. In pursuance of said conspiracy and to effect the objects thereof, the defendant, Arnold W. Kruse, at, to wit, Chicago, Illinois, on, to wit, March 13, 1935, signed, under oath, an income tax return for the Consensus Publishing Company.

29. In pursuance of said conspiracy and to effect the objects thereof, the defendant, Herbert S. Kamin, at, to wit, Chicago, Illinois, on, to wit, January, 15, 1936, signed, under oath, an income tax return for The Consensus Publishing Company.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

William J. Campbell,
United States Attorney.

UNITED STATES DISTRICT COURT.
• • (Caption—31760) • •

INDICTMENT.

Vio: Section 145, Title 26, U. S. C. A. (Attempting to defeat and evade income taxes of a corporation for the years 1933 to 1936, both inclusive) and Section 88, Title 18, U. S. C. A. (Conspiring to defeat and evade the income taxes of a corporation from 1929 to 1936, both inclusive.)

A true bill.

William P. Erickson,
Acting Foreman.

Filed in open court this _____ day of Aug. 22, 1939.

Hoyt King,
Clerk.

^{Filed} 16 And on, to wit, the 30th day of October, A. D. 1940,
^{Oct. 30,} came the defendants by their attorneys and filed in the
^{1939.} Clerk's office of said Court certain Petition for Order
 Releasing Oaths of Secrecy and for Other Relief, in words
 and figures following, to wit:

17 IN THE DISTRICT COURT OF THE UNITED STATES,
 For the Northern District of Illinois,
 Eastern Division.

In Re: Grand Jury Proceedings.

In the Matter of the Oaths of
 Secrecy of Witnesses and Others
 Before the Grand Jury for the
 June Term, 1939, Extended for
 the July Term, 1939, and the
 Grand Jury for the July Term,
 1939; the Oaths of Secrecy of
 the Grand Jurors, etc.

With respect to in-
 dictment num-
 bered 31762, and
 also indictments
 numbered
 31760
 31764
 31765
 31766
 31767.

PETITION FOR ORDER RELEASING OATHS OF SECRECY AND FOR OTHER RELIEF.

Now come defendants, Moses L. Annenberg, Falter H. Annenberg, James M. Ragen, James M. Ragen, Jr., Herbert S. Kamin, Harry Friedman, Jules Tayler, and Charles W. Bidwell, The Consensus Publishing Company, Nationwide News Service, Inc., Illinois Nationwide News Service, Inc., Bentley, Murray and Company, and Min-Haf Distributing Corporation, by Kirkland, Fleming, Green, Martin & Ellis and Weymouth Kirkland, their attorneys, and respectfully show unto the court as follows:

1. Petitioners are defendants named in one or more of indictments Nos. 31762, 31760, 31764, 31765, 31766, and 31767, each returned by the grand jury for the June Term, 1939, extended for the July Term, 1939, on August 30, 1939, except that indictment No. 31760 was returned on August 22, 1939.

2. The grand jury for the July Term, 1939, was en-

gaged in an investigation of alleged violations of the Anti-Trust laws on the part of some of defendants in the aforementioned indictments and persons associated with said defendants.

18 3. Your petitioners, James M. Ragen, James M. Ragen, Jr., Herbert S. Kamin, Harry Friedman, Jules Taylor and Charles W. Bidwell, by compulsion of subpoenas served upon them, testified as witnesses before the grand jury impaneled for the June Term, 1939, extended for the July Term, 1939, and your petitioners, James M. Ragen, Jr., Herbert S. Kamin, and Charles W. Bidwell testified as witnesses before the grand jury impaneled for the July Term, 1939, and each of said petitioners was required to and did take an oath before said grand juries, which purported to bind each of said petitioners to secrecy with respect to his testimony before said grand juries and with respect to the proceedings of said grand juries.

4. Numerous persons other than your petitioners, by compulsion of subpoenas served upon them, were required to appear and testify before either the grand jury for the June Term, 1939, extended for the July Term, 1939, or the grand jury for the July Term, 1939, or both of said grand juries, and each of said persons was required to and did take an oath before each of the grand juries before which he appeared, purporting to bind said persons to secrecy with respect to his testimony before such grand jury, and with respect to the proceedings of such grand jury.

5. The foreman of the grand jury for the June Term, 1939, extended for the July Term, 1939, and the foreman of the grand jury for the July Term, 1939, were required to and did take an oath in open court, which oath was as follows:

"You, as foreman of this Grand Inquest of the United States, do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge, the counsel of the Government, your fellows and your own, you shall keep secret; you shall present no one from envy, hatred or malice, nor leave any one unrepresented for fear, favor, affection, reward, or hope of reward, but you shall present all things truly as they come to your knowledge according to your best understanding. So help you God."

19 and each of the other members of said grand juries was required to and did take an oath in open court, which oath was as follows:

"You and each of you do solemnly swear that the oath your foreman has taken on his part you will well and truly observe and keep on your respective parts. So help you God."

Each of said grand juries has now been discharged from service and is no longer sitting.

6. Certain persons other than grand jurors, witnesses and attorneys were present in the grand jury rooms during the proceedings of the grand jury for the June Term 1939 extended for the July Term 1939, and the proceedings of the grand jury for the July Term 1939, and, upon information and belief, such persons were required to and did take an oath which purported to bind said persons to secrecy with respect to the proceedings of said grand juries.

7. The said oath which purported to impose secrecy upon the grand jurors, having served the purpose for which it was imposed, has been terminated by operation of law, and should in any event be released by specific order of court (save and except in so far as it relates to the vote, deliberations and discussions of said grand juries). The said oath which purported to impose secrecy upon persons present in the grand jury rooms other than jurors and witnesses has likewise been terminated by operation of law, and should in any event be released by specific order of court. The said oath which purported to impose secrecy upon those of your petitioners who testified before said grand juries and other witnesses before said grand juries was without warrant of law, in contravention of the principles of common law, and in contravention of the public policy of the United States; or has been terminated by operation of law; and should in any event be released by specific order of court.

20 8. The United States District Attorney for this

District has informed counsel for your petitioners that he considers that the oaths purporting to bind your petitioners who testified before said grand juries and other witnesses to secrecy are valid and binding and continue to be binding despite the discharge of the said grand juries, and that it would be unlawful for any of those of your petitioners who testified before said grand juries or any other witness to disclose to any one, including counsel for petitioners, his testimony before either of said grand juries. Some witnesses, on account of said secrecy oath, have refused and will refuse to discuss at all with

counsel for petitioners the matters involved in the above indictments.

9. The United States District Attorney for this District has refused to give counsel for your petitioners access to the transcript, minutes, or notes of either of said grand juries, or to state the facts with respect to the testimony or proceedings before either of said grand juries with reference to any of the matters hereinafter set forth; and specifically has refused such access and refused to state the facts with reference to the presence or participation of James V. Hayes, George S. Robinson or Sam Neel before the grand jury for the June Term, 1939, extended for the July Term, 1939; with reference to the presence or participation of Samuel Klaus, E. Riley Campbell or Earl C. Crouter before the grand jury for the June Term, 1939, extended for the July Term, 1939, while said grand jury was engaged in the investigation of matters upon which indictments Nos. 31765, 31766 and 31767 and Count V of indictment 31760 and Count VI of indictment 31762 were predicated; with reference to the time when the grand jury for the June Term, 1939, extended for the July Term, 1939, began the investigation on which indictments Nos.

31764, 31765 and 31766 were predicated; with reference to the testimony of your petitioners James M. Ragen, Jr., Herbert S. Kamin, and Charles W. Bidwill before the grand jury for the July Term, 1939; and with reference to the testimony of any witness, including any defendant before either grand jury. The United States Attorney for this District refused to grant counsel for your petitioners access to the transcript, minutes or notes of the grand jury to any extent whatsoever, and refused to disclose to any extent whatsoever any of the testimony before either of said grand juries or the proceedings of either of said grand juries.

10. It is necessary for the purposes of the arraignment of your petitioners, for the purposes of preparing appropriate pleas on behalf of your petitioners, and for the purposes of the preparation of the defense of your petitioners, as your petitioners will hereinafter set forth, that the oaths of secrecy imposed upon those of your petitioners who testified before said grand juries, other witnesses, grand jurors and other persons appearing before said grand juries be released by order of this court. Your petitioners should be given access to the minutes or notes of the pro-

ceedings of said grand juries for the purposes aforesaid. A denial of all or any part of the relief prayed for in this petition would violate the rights guaranteed to your petitioners and each of them by the Fifth and Sixth Amendments to the Constitution of the United States.

**Necessity of Requested Relief in Connection With
Arraignment.**

11. Your petitioners represent that they have been notified that they will be arraigned upon the indictments above mentioned on October 30, 1939, and that upon arraignment your petitioners will be required to plead to each of said indictments. Your petitioners are entitled to the advice of counsel with respect to any pleas to be made by or for them, but those of your petitioners who testified before said grand juries have been informed by their counsel that they will be unable adequately to represent said petitioners or to advise them with respect to their arraignment and the pleas to be entered by them unless they may fully discuss with their counsel all statements made by them concerning any matters alleged in any of said indictments, including all statements made by any of them in the presence of the representatives of the United States before either of said grand juries, and counsel will be unable adequately to represent your petitioners and properly to advise them with respect to their arraignment and the pleas to be entered by them unless your petitioners or their counsel may fully discuss with any witness having any knowledge of any matters alleged in any of said indictments all statements heretofore made by any of said witnesses, including any of said statements made in the presence of the representatives of the United States before either of said grand juries.

**Necessity of Requested Relief in Connection With Pleas
in Abatement.**

12. Your petitioners represent that various matters transpired before the grand jury for the June Term, 1939, which they believe constitute valid grounds for quashing the indictments, or some of them, returned by said grand jury; that your petitioners are advised by counsel that a plea in abatement praying that the indictments be abated

and quashed by reason of any matters transpiring before said grand jury or in connection with the legality of the grand jury may be overruled if verified upon information and belief and if not supported by positive and direct oath with respect to the matters alleged; that the relief
23 hereinafter prayed should be granted in order that your petitioners may prepare and properly verify pleas in abatement to said indictments, or some of them.

13. Your petitioners believe that pleas in abatement upon the following grounds are available to them with respect to some or all of the aforementioned indictments and should be filed by them or in their behalf:

(a) That there were present in the grand jury room wherein the proceedings of the grand jury for the June Term, 1939, extended for the July Term, 1939, were being conducted, and while said grand jury was in session and witnesses were testifying under oath, persons unauthorized by law to be present, to-wit: James V. Hayes, George S. Robinson and Sam Neel. While said persons may have had commissions purporting to authorize them to be present and to participate in the aforesaid proceedings, petitioners are informed and believe that said persons were not in fact authorized, as required by law, to take part in said proceedings or to be present before said grand jury.

(b) That Samuel Klaus, E. Riley Campbell and Earl C. Crouter were present during the proceedings before said grand jury while said grand jury was in session and witnesses were testifying under oath and while the grand jury was engaged in the investigation of matters upon which the indictments Nos. 31765 and 31766 were predicated, the said Samuel Klaus, E. Riley Campbell and Earl C. Crouter not having been authorized, as required by law, to be present or to participate in any way in said proceedings.

(c) That with respect to indictment No. 31767 and Count V of indictment No. 31760 and Count VI of indictment No. 31762, the aforementioned Samuel Klaus E. Riley Campbell and Earl C. Crouter were present in the grand jury room and participated in the proceedings before
24 said grand jury while said grand jury was in session and witnesses were testifying under oath and while the grand jury was engaged in the investigation of matters upon which indictment No. 31767 and Count V of

indictment No. 31760 and Count VI of indictment No. 31762 were predicated, the said Samuel Klaus, E. Riley Campbell and Earl C. Creuter not having been authorized, as required by law, to be present or to participate in any way in said proceedings.

(d) That there were present in the grand jury room wherein the proceedings of the grand jury for the June Term, 1939, extended for the July Term, 1939, were being conducted, and while said grand jury was in session and witnesses were testifying under oath, certain persons acting as stenographers, to-wit, Helen J. Kennedy and Ila C. Graham. Petitioners are informed and believe that said persons were not authorized, as required by law, to take part in said proceedings or to be present before said grand jury.

(e) That, with respect to indictments Nos. 31765 and 31766, the investigation on which said indictments were predicated did not begin until some time during the July Term, 1939. It appears from the face of said indictments that the substantive offenses therein charged did not occur until during the month of August, 1939. The grand jury for the June Term, 1939, and extended for the July Term, 1939, was extended by order of this court authorizing said extension solely for the purpose of permitting said grand jury to complete investigations begun but not completed during the June Term, 1939, such authority being the only warrant in law for the extension of said grand jury, and said grand jury therefore being without authority during the July Term, 1939, to begin the investigation of the alleged offenses charged in the aforesaid indictments Nos. 31765 and 31766.

25 (f) That with respect to indictment No. 31764, the investigation on which said indictment was predicated, did not begin until some time during the July Term, 1939, although the authority of the grand jury was limited as alleged in sub-paragraph (e) hereof.

14. Your petitioners have been advised that upon the basis of the allegations of paragraph 13 hereof said indictments are invalid and vulnerable to pleas in abatement. The relief hereinafter prayed should be granted to petitioners in order to enable them adequately to prepare and properly to verify and maintain pleas in abatement as aforesaid.

Necessity of Requested Relief in Connection with Special Pleas in Bar Based on Immunity.

15. Your petitioners James M. Ragen, Jr., Herbert S. Kamin, and Charles W. Bidwill were served with subpoenas commanding their appearance before the grand jury impaneled for the July Term, 1939, and by virtue of the compulsion of said subpoenas they appeared before the said grand jury; pursuant to the statute in such case made and provided (15 U. S. C. A. sec. 32), they received immunity from prosecution for and on account of any matters and things concerning which they might there testify or produce evidence documentary or otherwise; and, relying on such immunity, they proceeded to testify and give evidence before said grand jury. Said petitioners believe that the testimony and evidence so given by them, respectively, concerned the same transactions, matters and things charged in one or more of the aforesaid indictments returned against them and that, therefore, the immunity received by them extends to and includes the alleged offenses charged in one or more of the aforesaid indictments returned against them.

16. Said petitioners named in paragraph 15 desire to consult counsel as to the scope and effect of such immunity and as to whether they are immune from prosecution with respect to the offenses or some of the offenses charged in one or more of the said indictments and, if so advised that they are immune from prosecution with respect to said
26 offenses or some of them, they desire that pleas of such immunity be filed in their behalf; and unless petitioners are granted the relief hereinafter prayed for, they will be prejudiced with respect to filing and maintaining an appropriate plea in bar to one or more of the aforesaid indictments and will thus be deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States, and may be deprived of their right to present to this court for its determination an appropriate plea in bar to one or more of the aforesaid indictments because of such immunity.

Necessity for Requested Relief in Connection with Adequate and Proper Preparation for Trial.

17. In order appropriately to present their defense to the aforesaid indictments it may be necessary for your petitioners to call as witnesses at the trial thereof one or

more of the persons who appeared as witnesses before one or both of said grand juries and in doing so to vouch for such witnesses; and that before it can be determined by your petitioners and their counsel whether such witnesses or any of them shall be called to testify, it is essential that your petitioners or their counsel be informed of any and all statements heretofore made or testimony given by such witnesses with reference to the matters and things referred to in said indictments, including any testimony given by them or any of them before said grand juries.

18. Your petitioners who have testified before said grand juries have been advised by their counsel that they will not be able adequately to prepare for said petitioners' defense unless each of said petitioners is permitted fully and freely to discuss with his counsel any and all statements heretofore made by each of them with reference to the matters and things alleged in the aforesaid indictments, including all statements made by them before said grand juries.

19. Unless your petitioners are granted the relief hereinafter prayed for, in order that their counsel may
27 adequately and freely discuss with them and the said witnesses all of the facts and circumstances relating to the matters and things alleged in said indictments, they will be unable adequately to present their defenses to the aforesaid indictments, will be deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States and will be deprived of a fair and impartial trial as provided by the Sixth Amendment to the Constitution of the United States.

Prayer for Relief.

Wherefore, your petitioners pray that this Honorable Court enter an order granting each and all of the prayers for relief hereinafter set forth, which prayers for relief are severally and separately presented to this Court by your petitioners and each of them:

(a) Releasing or finding to have been terminated or finding to be of no force and effect the oaths taken before the grand jury for the June Term, 1939, extended for the July Term, 1939, purporting to bind your petitioners who testified before said grand juries to secrecy;

(b) Releasing or finding to have been terminated or finding to be of no force and effect the oaths taken before

the grand jury for the July Term, 1939, purporting to bind your petitioners who testified before said grand juries to secrecy;

(c) Releasing or finding to have been terminated or finding to be of no force and effect the oaths taken before the grand jury for the June Term, 1939, extended for the July Term, 1939, purporting to bind witnesses other than your petitioners to secrecy, so as to permit your petitioners and their counsel to interview said witnesses and so as to permit any such witnesses who may wish to do so freely to

discuss with your petitioners and their counsel all of
28 the facts and circumstances within their knowledge,
relating to the matters and things alleged in said
indictments, including statements made by them with respect to said matters before said grand jury;

(d) Releasing or finding to have been terminated or finding to be of no force and effect the oaths taken before the grand jury for the July Term, 1939, purporting to bind witnesses other than your petitioners to secrecy, so as to permit your petitioners and their counsel to interview said witnesses and so as to permit any such witnesses who may wish to do so freely to discuss with your petitioners and their counsel all of the facts and circumstances within their knowledge relating to the matters and things alleged in said indictments, including statements made by them with respect to said matters before said grand jury;

(e) Releasing, terminating or finding to have been terminated the oaths purporting to bind to secrecy each grand juror of the grand jury for the June term, 1939, extended for the July term, 1939 so as to permit any of such grand jurors as may wish to do so to discuss with your petitioners or their counsel such matters as occurred before said grand jury as they may be willing to discuss except that no grand juror shall be permitted to disclose the vote of the grand jury or of any of the jurors upon any indictment or the discussions or deliberations of the grand jurors among themselves;

(f) Releasing, terminating or finding to have been terminated the oaths purporting to bind to secrecy each grand juror of the grand jury for the July term, 1939, so as to permit any such grand jurors as may wish to do so to discuss with your petitioners or their counsel such matters as occurred before said grand jury as they may be
29 willing to discuss except that no grand juror shall be permitted to disclose the vote of the grand jury or of

any of the jurors upon any indictment or the discussions or deliberations of the grand jurors among themselves;

(g) Releasing, terminating or finding to have been terminated the oaths purporting to bind persons other than grand jurors, witnesses and attorneys who were present in the grand jury room during the proceedings of the grand jury for the June term, 1939, extended for the July term, 1939, so as to permit any such person who may wish to do so freely to discuss with petitioners and their counsel such matters as occurred before said grand jury as he may be willing to discuss;

(h) Releasing, terminating or finding to have been terminated the oaths purporting to bind persons other than grand jurors, witnesses, and attorneys who were present in the grand jury room during the proceedings of the grand jury for the July term, 1939, so as to permit any such person who may wish to do so freely to discuss with petitioners and their counsel such matters as occurred before said grand jury as he may be willing to discuss;

(i) Giving your petitioners access to the transcript, minutes and notes of the proceedings of the grand jury for the June term, 1939, extended for the July term, 1939, in so far as they relate to the matters above referred to;

(j) Giving your petitioners access to the transcript, minutes and notes of the proceedings of the grand jury for the July term, 1939, in so far as they relate to the matters above referred to;

(k) Giving your petitioners access to the transcript, minutes and notes of the proceedings of the grand jury for the June term, 1939, extended for the July term, 1939, relating to the testimony of your petitioners;

30 (l) Giving your petitioners access to the transcript, minutes and notes for the proceedings of the grand jury for the July Term, 1939, relating to the testimony of your petitioners;

(m) Granting such other and further relief as to the court may seem proper.

Kirkland, Fleming, Green,
Martin & Ellis,
Weymouth Kirkland,
Counsel for Petitioners.

31 United States of America, }
State of New York, } ss.
County of New York. }

Jules Taylor, being first duly sworn, on oath deposes and says that he is a petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true.

Jules Taylor.

Subscribed and sworn to before me this 26th day of October, 1939.

Anne Schneider,
Notary Public.

(Seal)

Anne Schneider, Notary Public, Kings Co.
Kings Co. Clk's No. 510, Reg. No. 671
N. Y. Co. Clk's No. 1380, Reg. No. O-S-874
Commission Expires March 30, 1940

No. 19000

State of New York, }
County of New York, } ss.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, the same being a Court of Record having by law a seal, Do Hereby Certify, that Anne Schneider, whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

In Witness Whereof, I have hereunto set my hand and

affixed the seal of said Court at the City of New York, in the County of New York, this 27th day of Oct., 1939.

(Seal) Archibald B. Watson,
*County Clerk and Clerk of the
Supreme Court.*

32 United States of America,
Eastern District of Pennsylvania, } ss.
State of Pennsylvania,
County of Philadelphia.

Moses L. Annenberg and Walter H. Annenberg, being first duly sworn, on oath depose and say that they are petitioners named in the foregoing petition; that they have read said petition and know the contents thereof and that the same is true.

Moses L. Annenberg.
Walter H. Annenberg.

Subscribed and sworn to before me this 26th day of October, 1939.

(Seal) Mary A. Fulton,
Notary Public.

My Commission Expires August 2nd, 1942.

IN THE COURTS OF COMMON PLEAS OF PHILADELPHIA COUNTY.

State of Pennsylvania } ss.
County of Philadelphia,

I, John M. Scott, Prothonotary of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following Certificate, acting by my Principal Deputy, Meredith Hanna, or my Second Deputy, John J. Hoerr, do Certify, That Mary A. Fulton, Esquire, before whom the annexed affidavit was made, was at the time of so doing a Notary Public for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily

believe the signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

The impression of the seal of the Notary Public is not required by law to be filed in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 26th day of October in the year of our Lord one thousand nine hundred thirty-nine (1939).

John M. Scott,

Prothonotary.

By Meredith Hanna,

Principal Deputy Prothonotary.

Durante Absentis, Secundum Legem.

(Seal)

33 United States of America, }
Northern District of Illinois, } ss.
State of Illinois, }
County of Cook. }

James M. Ragen, Jr., being first duly sworn, on oath deposes and says that he is Vice President of The Consensus Publishing Company, the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true.

James M. Ragen, Jr.

Subscribed and sworn to before me this 28th day of October, 1939.

Zella M. Rose,

Notary Public.

(Seal)

34 United States of America, }
Northern District of Illinois, } ss.
State of Illinois, }
County of Cook. }

James M. Ragen, being first duly sworn, on oath deposes and says that he is the President of Illinois Nationwide News Service, Inc., and the President of Nationwide News Service, Inc., petitioners named in the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true.

James M. Ragen.

Subscribed and sworn to before me this 28th day of October, 1939.

Zella M. Rose,

Notary Public.

(Seal)

- 35 United States of America, }
Northern District of Illinois, } ss.
State of Illinois,
County of Cook.

James M. Ragen, James M. Ragen, Jr., Herbert S. Kamin, Harry Friedman, and Charles W. Bidwill, being first duly sworn, on oath depose and say that they are petitioners named in the foregoing petition, that they have read said petition and know the contents thereof and that the same is true.

James M. Ragen,
James M. Ragen, Jr.,
Herbert S. Kamin,
Harry Friedman,
Charles W. Bidwill.

Subscribed and sworn to before me this 28th day of October, 1939.

Zella M. Rose,
Notary Public.

(Seal)

- 36 United States of America, }
Northern District of Illinois, } ss.
State of Illinois,
County of Cook.

Charles W. Bidwell, being first duly sworn, on oath deposes and says that he is President of Bentley, Murray and Company, petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true.

Charles W. Bidwell.

Subscribed and sworn to before me this 28th day of October, 1939.

Zella M. Rose,
Notary Public.

(Seal)

- 37 United States of America, }
Northern District of Illinois, } ss.
State of Illinois,
County of Cook.

Joseph E. Hafner, being first duly sworn, on oath deposes and says that he is President of Min-Haf Distributing Corporation, petitioner named in the foregoing peti-

tion; that he has read said petition and knows the contents thereof and that the same is true.

Joseph E. Hafner.

Subscribed and sworn to before me this 28th day of October, 1939.

Zella M. Rose,
Notary Public.

(Seal)

38 United States of America, }
Northern District of Illinois, } ss.
State of Illinois, }
County of Cook. }

Joseph E. Hafner, being first duly sworn, on oath deposes and says that he is President of Min-Haf Distributing Corporation, petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true.

Joseph E. Hafner.

Subscribed and sworn to before me this 28th day of October, 1939.

Zella M. Rose,
Notary Public.

(Seal)

39 Endorsed: In the District Court of the United States * * (Caption) * * Petition for Order Releasing Oaths of Secrecy and for Other Relief Filed Oct 30 1939 Hoyt King, Clerk.

40 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption 31762, 31760 and 31763) * *

PETITION FOR ORDER RELEASING OATHS OF
SECRECY AND FOR OTHER RELIEF.

Now come Arnold W. Kruse and Lester A. Kruse, by Miller, Gorham, Wescott and Adams, their attorneys, and respectfully show unto the court as follows:

1. On August 30, 1939, the grand jury for the June term, 1939, returned an indictment entitled "*United States v. Moses L. Annenberg, et al.*," No. 61762, naming as defendants certain persons including your petitioner, Arnold W. Kruse. On August 22, 1939, an indictment entitled "*United States v. Moses L. Annenberg, et al.*," No. 31760,

was returned by the said grand jury naming as defendants certain persons including your petitioners Arnold W. Kruse and Lester A. Kruse. On August 30, 1939, an indictment entitled "*United States v. Arnold W. Kruse*," No. 31763, was returned by the said grand jury naming as defendant your petitioner Arnold W. Kruse.

2. The grand jury for the July term, 1939, was engaged in an investigation of alleged violations of the Anti-Trust laws on the part of some of the defendants in the aforementioned indictments and persons associated with said parties defendant.

41 3. Your petitioners, by compulsion of subpoenas served upon them, testified as witnesses before the grand jury impaneled for the June term, 1939, extended for the July term, 1939, and each of your petitioners was required to and did take an oath before said grand jury which purported to bind each of your petitioners to secrecy with respect to his testimony before said grand jury and with respect to the proceedings of said grand jury. Your petitioner, Arnold W. Kruse, by compulsion of a subpoena served upon him, testified as a witness before the grand jury impaneled for the July term, 1939, and was required to and did take an oath before said grand jury which purported to bind him to secrecy with respect to his testimony before said grand jury and with respect to the proceedings of said grand jury.

4. Numerous persons other than your petitioners, by compulsion of subpoenas served upon them, were required to appear and testify before either the grand jury for the June term, 1939, extended for the July term, 1939, or the grand jury for the July term, 1939, or both of said grand juries, and each of said persons was required to and did take an oath before each of the grand juries before which he appeared, purporting to bind said person to secrecy with respect to his testimony before such grand jury, and with respect to the proceedings of such grand jury.

5. The foreman of the grand jury for the June term, 1939, extended for the July term, 1939, and the foreman of the grand jury for the July term, 1939, were required to and did take an oath in open court, which oath was as follows:

"You, as foreman of this Grand Inquest of the United States, do solemnly swear that you will diligently inquire and true presentment make of all such matters and things

as shall be given you in charge, the counsel of the Gov-
42 ernment, your fellows and your own, you shall keep
secret; you shall present no one from envy, hatred, or
malice, nor leave any one unrepresented for fear, favor,
affection, reward or hope of reward, but you shall present
all things truly as they come to your knowledge according
to your best understanding. So help you God.”
and each of the other members of said grand juries was
required to and did take an oath in open court, which oath
was as follows:

“You and each of you do solemnly swear that the oath
your foreman has taken on his part you will well and truly
observe and keep on your respective parts. So help you
God.”

Each of said grand juries has now been discharged from
service and is no longer sitting.

6. Certain persons other than grand jurors and wit-
nesses and attorneys were present in the grand jury rooms
during the proceedings of the grand jury for the June
term, 1939 extended for the July term, 1939, and the pro-
ceedings of the grand jury for the July term, 1939, and,
upon information and belief, such other persons were re-
quired to and did take an oath which purported to bind
said persons to secrecy with respect to the proceedings of
said grand juries.

7. The said oath which purported to impose secrecy
upon the grand jurors, having served the purpose for
which it was imposed, has been terminated by operation of
law, and should, in any event, be released by specific order
of court (save and except in so far as it relates to the
vote, deliberations and discussions of said grand juries).
The said oath which purported to impose secrecy upon
persons present in the grand jury rooms other than jurors
and witnesses has likewise been terminated by operation
of law, and should, in any event, be released by specific
order of court. The said oath which purported to im-

43 pose secrecy upon your petitioners and other wit-
nesses before said grand juries was without warrant
of law, in contravention of the principles of common law,
and in contravention of the public policy of the United
States; or has been terminated by operation of law; and
should, in any event, be released by specific order of court.

8. The United States District Attorney for this Dis-
trict has informed counsel for your petitioners that he
considers that the oaths purporting to bind your petitioners

and other witnesses to secrecy are valid and binding and continue to be binding despite the discharge of the said grand juries, and that it would be unlawful for any of your petitioners or any other witness to disclose to anyone, including counsel for your petitioners, his testimony before either of said grand juries. Some witnesses, on account of said secrecy oath, have refused and will refuse to discuss at all with counsel for defendants any of the matters involved in the above indictments.

9. The United States District Attorney for this District has refused to give counsel for your petitioners access to the transcript, minutes, or notes of either of said grand juries, or to state the facts with respect to the testimony or proceedings before either of said grand juries with reference to any of the matters hereinafter set forth; and specifically has refused such access and refused to state the facts with reference to the presence or participation of James V. Hayes, George S. Robinson or Sam Neel before the grand jury for the June term, 1939, extended for the July term, 1939; with reference to the presence or participation of Samuel Klaus, E. Riley Campbell or Earl C. Crouter before the grand jury for the June term, 1939, extended for the July term, 1939, while said grand

44 jury was engaged in the investigation of matters upon which Count V of indictment 31760 and Count VI of indictment 31762 were predicated; with reference to the time when the grand jury for the June Term, 1939, extended for the July Term, 1939, began the investigation on which indictment 31763 was predicated; with reference to the testimony of your petitioner Arnold W. Kruse before the grand jury for the July Term, 1939; and with reference to the testimony of any witness, including any defendant before either grand jury. The United States District Attorney for this District refused to grant counsel for your petitioners access to the transcript, minutes or notes of the grand jury to any extent whatsoever, and refused to disclose to any extent whatsoever any of the testimony before either of said grand juries or the proceedings of either of said grand juries.

10. It is necessary for the purposes (1) of the arraignment of your petitioners, for the purposes of (2) preparing appropriate pleas on behalf of your petitioners, and for the purposes of the (3) preparation of the defense of your petitioners, as your petitioners will hereinafter set forth, that the oaths of secrecy imposed upon your petitioners,

other witnesses, grand jurors and other persons appearing before the grand juries be released by order of this court. Your petitioners should be given access to the transcript, minutes, and notes of the proceedings of said grand juries for the purposes aforesaid. A denial of all or any part of the relief prayed for in this petition would violate the rights guaranteed to your petitioners and each of them by the Fifth and Sixth Amendments to the Constitution of the United States.

**Necessity of Requested Relief in Connection With
Arraignment.**

11. Your petitioners represent that they have been notified that they will be arraigned upon the indict-
45 ments above mentioned on or about October 30, 1939, and that upon arraignment your petitioners will be required to plead to each of said indictments. Your petitioners have been informed by their counsel that they will be unable adequately to represent your petitioners or to advise your petitioners with respect to their arraignment and the pleas to be entered by them unless your petitioners may fully discuss with their counsel all statements made by them concerning any matters alleged in any of said indictments, including all statements made by them in the presence of representatives of the United States, before either of said grand juries and counsel will be unable adequately to represent your petitioners and properly advise them with respect to their arraignment and the pleas to be entered by them unless your petitioners or their counsel may fully discuss with any witness having any knowledge of any matters alleged in any of said indictments all statements heretofore made by any of said witnesses, including any of said statements made by them in the presence of representatives of the United States, before either of said grand juries.

**Necessity of Requested Relief in Connection with Pleas
in Abatement.**

12. Your petitioners represent that various matters transpired before the grand jury for the June Term 1939, which they believe constitute valid grounds for quashing the indictments, or some of them, returned in said grand jury; that your petitioners are advised by counsel that a

plea in abatement praying that the indictments be abated and quashed by reason of any matters transpiring before said grand jury or in connection with the legality of the grand jury may be overruled if verified upon information and belief and if not supported by positive and direct oath with respect to the matters alleged; that the relief hereinafter prayed should be granted in order that your petitioners may prepare and properly verify pleas in abatement to said indictments, or some of them.

13. Your petitioners believe that the following pleas in abatement upon the following grounds are available to them with respect to some or all of the aforementioned indictments and should be filed by them or in their behalf:

(a) That there were present in the grand jury room wherein the proceedings of the grand jury for the June term, 1939, extended for the July term, 1939, were being conducted, and while said grand jury was in session and witnesses were testifying under oath, persons unauthorized by law to be present, to-wit: James V. Hayes, George S. Robinson and Sam Neel. While said persons may have had commissions purporting to authorize them to be present and to participate in the aforesaid proceedings, petitioners are informed and believe that said persons were not in fact authorized as required by law to take part in said proceedings or to be present before said grand jury.

(b) That with respect to Count V of indictment No. 31760 and Count VI of indictment No. 31762, Samuel Klaus, E. Riley Campbell and Earl C. Cronter were present in the grand jury room and participated in the proceedings before said grand jury while said grand jury was in session and witnesses were testifying under oath and while the grand jury was engaged in the investigation of matters upon which said Counts in said indictments Nos. 31760 and 31762 were predicated, the said Samuel Klaus, E. Riley Campbell and Earl C. Cronter not having been authorized as required by law to be present or to participate in any way in said proceedings.

(c) That there were present in the grand jury room wherein the proceedings of the grand jury for the June term, 1939, extended for the July term, 1939, were being conducted, and while said grand jury was in session and witnesses were testifying under oath, certain persons acting as stenographers, to-wit, Helen J. Kennedy and Ila C. Graham. Petitioners are informed and believe

that said persons were not authorized as required by law to take part in said proceedings or to be present before said grand jury.

(d) That with respect to indictment No. 31763, the investigation on which said indictment was predicated did not begin until some time during the July term, 1939. The grand jury for the June term, 1939, extended for the July term, 1939, was extended by order of this court authorizing said extension solely for the purpose of permitting said grand jury to complete investigations begun but not completed during the June term, 1939, such authority being the only warrant in law for the extension of said grand jury and said grand jury therefore being without authority during the July term, 1939, to begin the investigation of the alleged offenses charged in the aforesaid indictment No. 31763.

14. Your petitioners have been advised that upon the basis of the allegations of paragraph 13 hereof said indictments are invalid and vulnerable to pleas in abatement; that the relief hereinafter prayed should be granted to petitioners in order to enable them adequately to prepare and properly to verify and maintain pleas in abatement aforesaid.

Necessity of Requested Relief in Connection With Special Pleas in Bar Based on Immunity.

15. Your petitioner Arnold W. Kruse was served with a subpoena commanding his appearance before the grand jury impaneled for the July Term, 1939, and by virtue of the compulsion of said subpoena he appeared before the said grand jury; pursuant to the statute in such case made and provided (15 U. S. C. A. sec. 32), he received immunity from prosecution for and on account of any matters and things concerning which he might there testify or produce evidence documentary or otherwise; and relying on such immunity he proceeded to testify and give evidence before said grand jury. Your petitioner Arnold W. Kruse believes that the testimony and evidence so given by him concerned the same transactions, matters and things charged in one or more of the aforesaid indictments returned against him, and therefore the immunity received by him extends to and includes the alleged offenses charged in one or more of the aforesaid indictments returned against him.

16. Your petitioner Arnold W. Kruse desires to consult counsel as to the scope and effect of such immunity and as to whether he is immune from prosecution with respect to the offenses or some of the offenses charged in one or more of the said indictments, and if so advised that he is immune from prosecution with respect to said offenses, or some of them, he desires that pleas of such immunity be filed in his behalf; and unless your said petitioner is granted the relief hereinafter prayed for he will be prejudiced with respect to filing and maintaining an appropriate plea in bar to one or more of the aforesaid indictments and will thus be deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States, and may be deprived of his right to present to this court for its determination an appropriate plea in bar to one or more of the aforesaid indictments because of such immunity.

Necessity for Requested Relief in Connection with Adequate and Proper Preparation for Trial.

17. In order appropriately to present their defense to the aforesaid indictments it may be necessary for your petitioners to call as witnesses at the trial ^{one} of one
49 or more of the persons who appeared as witnesses before one or both of said grand juries, and in doing so to vouch for such witnesses; and that before it can be determined by your petitioners and their counsel whether such witnesses or any of them shall be called to testify, it is essential that your petitioners or their counsel be informed of any and all statements heretofore made or testimony given by such witnesses with reference to the matters and things referred to in said indictments, including any testimony given by them or any of them before said grand juries.

18. Your petitioners have been advised by their counsel that they will not be able adequately to prepare for petitioners' defense unless each of your petitioners is permitted fully and freely to discuss with his counsel any and all statements heretofore made by each of them with reference to the matters and things alleged in the aforesaid indictments, including all statements made by them before said grand juries.

19. Unless your petitioners are granted the relief hereinafter prayed for, in order that their counsel may ade-

quately and freely discuss with your petitioners and the said witnesses all of the facts and circumstances relating to things alleged in said indictments, including all statements made by them before said grand juries, they will be unable adequately to present their defense to the aforesaid indictments, will be deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States, and will be deprived of a fair and impartial trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

Prayer for Relief.

Wherefore, your petitioners pray that this Honorable Court enter an order granting each and all of the prayers for relief hereinafter set forth, which prayers for relief are severally and separately presented to this Court by your petitioners and each of them:

50 (a) Releasing or finding to have been terminated or finding to be of no force and effect the oaths purporting to bind your petitioners to secrecy, taken before the grand jury for the June Term, 1939, extended for the July Term, 1939;

(b) Releasing or finding to have been terminated or finding to be of no force and effect the oath purporting to bind your petitioner Arnold W. Kruse to secrecy, taken before the grand jury for the July Term, 1939;

(c) Releasing or finding to have been terminated or finding to be of no force and effect the oaths taken before the grand jury for the June Term, 1939, extended for the July Term, 1939, purporting to bind witnesses other than your petitioners to secrecy, so as to permit your petitioners and their counsel to interview said witnesses and so as to permit any such witnesses who may wish to do so freely to discuss with your petitioners and their counsel all of the facts and circumstances within their knowledge relating to the matters and things alleged in said indictments, including statements made by them with respect to said matters before said grand jury;

(d) Releasing or finding to have been terminated or finding to be of no force and effect the oaths taken before the grand jury for the July Term, 1939, purporting to bind witnesses other than your petitioners to secrecy, so as to permit your petitioners and their counsel to interview said witnesses and so as to permit any such witnesses who may

wish to do so to freely discuss with your petitioners and their counsel all of the facts and circumstances within their knowledge relating to the matters and things alleged
51 in said indictments, including statements made by them with respect to said matters before said grand jury;

(c) Releasing, terminating or finding to have been terminated the oaths purporting to bind to secrecy each grand juror of the grand jury for the June Term, 1939, extended for the July Term, 1939, so as to permit any of such grand jurors as may wish to do so to discuss with your petitioners or their counsel such matters as occurred before said grand jury as they may be willing to discuss except that no grand juror shall be permitted to disclose the vote of the grand jury or of any of the jurors upon any indictment or the discussions or deliberations of the grand jurors among themselves;

(f) Releasing, terminating or finding to have been terminated the oaths purporting to bind to secrecy each grand juror of the grand jury for the July Term, 1939, so as to permit any such grand jurors as may wish to do so to discuss with your petitioners or their counsel such matters as occurred before said grand jury as they may be willing to discuss except that no grand juror shall be permitted to disclose the vote of the grand jury or of any of the jurors upon any indictment or the discussions or deliberations of the grand jurors among themselves;

(g) Releasing, terminating or finding to have been terminated the oaths purporting to bind persons other than grand jurors, witnesses and attorneys who were present in the grand jury room during the proceedings of the grand jury for the June Term, 1939, extended for the July Term, 1939, so as to permit any such person who may wish to do so freely to discuss with petitioners and their counsel
52 such matters as occurred before said grand jury as he may be willing to discuss;

(h) Releasing, terminating or finding to have been terminated the oaths purporting to bind persons other than grand jurors, witnesses and attorneys who were present in the grand jury room during the proceedings of the grand jury for the July Term, 1939, so as to permit any such person who may wish to do so freely to discuss with petitioners and their counsel such matters as occurred before said grand jury as he may be willing to discuss;

(i) Giving your petitioners access to the transcript, minutes, and notes of the proceedings of the grand jury

for the June Term, 1939, extended for the July Term, 1939, in so far as they relate to the matters above referred to;

(j) Giving your petitioners access to the transcript, minutes and notes of the proceedings of the grand jury for the July Term, 1939, in so far as they relate to the matters above referred to;

(k) Giving your petitioners access to the transcript, minutes, and notes of the proceedings of the grand jury for the June Term, 1939, extended for the July Term, 1939, relating to the testimony of your petitioners;

(l) Giving your petitioners access to the transcript, minutes, and notes of the proceedings of the grand jury for the July Term, 1939, relating to the testimony of your petitioner Arnold W. Kruse;

(m) Granting such other and further relief as to the court may seem proper.

(Sgd.) Miller, Gorham, Wescott and Adams,
Counsel for Arnold W. Kruse and Lester
A. Kruse, Petitioners.

United States of America, }
State of Illinois, } ss.
County of Cook. }

Arnold W. Kruse and Lester A. Kruse, being first duly sworn, on oath depose and say that they are the petitioners named in the foregoing petition; that they have read said petition and know the contents thereof and that the same is true.

(Sgd.) Arnold W. Kruse,

(Sgd.) Lester A. Kruse.

Subscribed and Sworn to before me this 28th day of October, A. D. 1939.

Marco Vladiniroff,
Notary Public.

(Seal)

54 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

PETITION FOR ORDER RELEASING OATHS OF
SECRECY AND FOR OTHER RELIEF.

Now comes William Molasky, by David Baron, his attorney, and respectfully shows unto the court as follows:

1. On August 22, 1939, the grand jury for the June Term 1939, extended for the July Term 1939, returned an indictment entitled "United States vs. Moses L. Annenberg, et al.," No. 31760, naming as defendants certain persons including your petitioner.

2. The grand jury for the July Term 1939 was engaged in an investigation of alleged violations of the anti-trust laws on the part of some of the defendants in the aforementioned indictment and persons associated with said parties defendant, when the evidence hereinafter referred to was produced before it and the proceedings hereinafter referred to were had before it.

3. Your petitioner, by compulsion of a subpoena served upon him, testified as a witness before the grand jury impaneled for the June Term 1939 extended for the July Term 1939, and before the grand jury impaneled for the July Term 1939, and your petitioner was required to and did take an oath before each of said grand juries, which
55 purported to bind your petitioner to secrecy with respect to his testimony before said grand juries and with respect to the proceedings of said grand juries.

4. Numerous persons other than your petitioner, by compulsion of subpoenas served upon them, were required to appear and testify before either the grand jury for the June Term 1929 extended for the July Term 1939, or the grand jury for the July Term 1939, or both of said grand juries, and each of said persons was required to and did take an oath before each of the grand juries before which he appeared, purporting to bind said person to secrecy with respect to his testimony before such grand jury, and with respect to the proceedings of such grand jury.

5. The foreman of the grand jury for the June Term 1939 extended for the July Term 1939, and the foreman of the grand jury for the July Term 1939 were required to and did take an oath in open court, which oath was as follows:

"You, as foreman of this Grand Inquest of the United States, do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge, the counsel of the Government, your fellows and your own, you shall keep secret; you shall present no one from envy, hatred or malice, nor leave any one unrepresented for fear, favor, affection, reward, or hope of reward, but you shall present all things truly as they come to your knowledge according to your best understanding. So help you God."

and each of the other members of said grand juries was required to and did take an oath in open court, which oath was as follows:

"You and each of you do solemnly swear that the oath your foreman has taken on his part you will tell and truly observe and keep on your respective parts. So help you God."

Each of said grand juries has now been discharged from service and is no longer sitting.

56 6. Certain persons other than grand jurors, witnesses, and attorneys were present in the grand jury rooms during the proceedings of the grand jury for the June Term 1939 extended for the July Term 1939, and the proceedings of the grand jury for the July Term 1939, and, upon information and belief, such other persons were required to and did take an oath which purported to bind said persons to secrecy with respect to the proceedings of said grand juries.

7. The said oath which purported to impose secrecy upon the grand jurors, having served the purpose for which it was imposed, has been terminated by operation of law and should in any event be released by specific order of court (save and except in so far as it relates to the vote, deliberations and discussions of said grand juries). The said oath which purported to impose secrecy upon persons present in the grand jury rooms other than jurors and witnesses has likewise been terminated by operation of law and should in any event be released by specific order of court. The said oath which purported to impose secrecy upon your petitioner and other witnesses before said grand juries was without warrant of law, in contravention of the principles of common law, and in contravention of the public policy of the United States; or has been terminated by operation of law; and should in any event be released by specific order of court.

8. The United States District Attorney for this District has informed counsel for your petitioner that he considers that the oaths purporting to bind your petitioner and other witnesses to secrecy are valid and binding and continue to be binding despite the discharge of the said grand juries, and that it would be unlawful for your petitioner or any other witness to disclose to anyone, including counsel
57 for your petitioner, his testimony before either of said grand juries. Some witnesses, on account of said secrecy oath, have refused and will refuse to discuss at all with counsel for defendants any of the matters involved in the above indictment.

9. It is necessary for the purposes of the arraignment of your petitioner, for the purposes of preparing appropriate pleas on behalf of your petitioner, and for the purposes of the preparation of the defense of your petitioner, as your petitioner will hereinafter set forth, that the oaths of secrecy imposed upon your petitioner, other witnesses, grand jurors and other persons appearing before the grand juries be released by order of this court and that your petitioner be given access to the transcript, minutes and notes of the proceedings of said grand juries. A denial of all or any part of the relief prayed for in this petition would violate the rights guaranteed to your petitioner by the Fifth and Sixth Amendments to the Constitution of the United States.

Necessity of Requested Relief in Connection with Arraignment.

10. Your petitioner represents that he has been notified that he will be arraigned upon the indictment above mentioned on or about October 30, 1939, and that upon arraignment your petitioner will be required to plead to said indictment. Your petitioner is entitled to the advice of counsel with respect to any pleas to be made by or for him, but your petitioner has been informed by his counsel that he will be unable adequately to represent your petitioner or to advise your petitioner with respect to his arraignment and the pleas to be entered by him unless your petitioner may fully discuss with his counsel all statements made by him concerning any matters alleged in
58 said indictment, including all statements made by him in the presence of representatives of the United States, before either of said grand juries, and counsel will be un-

able adequately to represent your petitioner and properly to advise him with respect to his arraignment and the pleas to be entered by him unless your petitioner or his counsel may fully discuss with any witness having any knowledge of any matters alleged in said indictment all statements heretofore made by any of said witnesses, including any of said statements made in the presence of representatives of the United States, before either of said grand juries.

Necessity of Requested Relief in Connection with Pleas in Abatement.

11. Your petitioner represents that various matters transpired before the grand jury for the June Term 1939 which he believes constitute valid grounds for quashing the indictment returned by said grand jury; that your petitioner is advised by counsel that a plea in abatement praying that the indictment be abated and quashed by reason of any matters transpiring before said grand jury or in connection with the legality of the grand jury may be overruled if verified upon information and belief if not supported by positive and direct oath with respect to the matters alleged; that the relief hereinafter prayed should be granted in order that your petitioner may prepare and properly verify pleas in abatement to said indictment.

12. Your petitioner believes that pleas in abatement on the following grounds are available to him with respect to the aforementioned indictment and should be filed by him or in his behalf:

(a) That there were present in the grand jury room wherein the proceedings of the grand jury for the June Term 1939 extended for the July Term 1939 were being conducted, and while said grand jury was in session 59 and witnesses were testifying under oath, persons unauthorized by law to be present, to-wit: James V. Hayes, George S. Robinson and Sam Neel. While said persons may have had commissions purporting to authorize them to be present and to participate in the aforesaid proceedings, petitioner is informed and believes that said persons were not in fact authorized as required by law to take part in said proceedings or to be present before said grand jury.

(b) That, with respect to Count VI of indictment number 31760, Samuel Klaus, E. Riley Campbell and Earl C.

Crouter were present in the grand jury room and participated in the proceedings before said grand jury while said grand jury was in session and witnesses were testifying under oath and while the grand jury was engaged in the investigation of matters upon which indictment number 31760 was predicated, the said Samuel Klaus, E. Riley Campbell and Earl C. Crouter not having been authorized as required by law to be present or to participate in any way in said proceedings.

(c) That there were present in the grand jury room wherein the proceedings of the grand jury for the June Term 1939 extended for the July Term 1939 were being conducted, and while said grand jury was in session and witnesses were testifying under oath, certain persons acting as stenographers, to-wit, Helen J. Kennedy and Ila C. Graham. Petitioner is informed and believes that said persons were not authorized as required by law to take part in said proceedings or to be present before said grand jury.

13. Your petitioner has been advised that, upon the basis of the allegations of paragraph 12 hereof, said indictment is invalid and vulnerable to a plea in abatement; that the relief hereinafter prayed should be granted to petitioner in order to enable him adequately to prepare, properly to verify and to maintain pleas in abatement as aforesaid.

60 Necessity of Requested Relief in Connection with
Special Pleas in Bar Based on Immunity.

14. Your petitioner, William Molasky, was served with a subpoena commanding his appearance before the grand jury impaneled for the July Term 1939, and by virtue of the compulsion of said subpoena he appeared before the said grand jury; pursuant to the statute in such case made and provided (15 U. S. C. A. sec. 32), he received immunity from prosecution for and on account of any matters and things concerning which he might there testify or produce evidence documentary or otherwise; and relying on such immunity he proceeded to testify and give evidence before said grand jury. Your petitioner believes that the testimony and evidence so given by him concerned the same transactions, matters and things charged in the aforesaid indictment returned against him and that, there-

fore, the immunity received by him extends to and includes the alleged offenses charged in the aforesaid indictment returned against him.

15. Your petitioner desires to consult counsel as to the scope and effect of such immunity and as to whether he is immune from prosecution with respect to the offenses or some of the offenses charged in the said indictment, and if so advised that he is immune from prosecution with respect to said offenses or some of them, he desires that pleas of immunity be filed in his behalf; and unless your petitioner is granted the relief hereinafter prayed for, he will be prejudiced with respect to filing and maintaining an appropriate plea in bar to the aforesaid indictment and will thus be deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States, and will be deprived of his right to present to
61 this Court for its determination an appropriate plea in bar to the aforesaid indictment because of such immunity.

Necessity for Requested Relief in Connection With Adequate and Proper Preparation for Trial.

16. In order appropriately to present his defense to the aforesaid indictment it may be necessary for your petitioner to call as witnesses at the trial thereof one or more of the persons who appeared as witnesses before one or both of said grand juries and, in doing so, to vouch for such witnesses; and that before it can be determined by your petitioner and his counsel whether such witnesses or any of them shall be called to testify, it is essential that your petitioner or his counsel be informed of any and all statements heretofore made or testimony given by such witnesses with reference to the matters and things referred to in said indictment, including any testimony given them or any of them before said grand juries.

17. Your petitioner has been advised by his counsel that he will not be able adequately to prepare for petitioner's defense unless your petitioner is permitted fully and freely to discuss with his counsel any and all statements heretofore made by him with reference to the matters and things alleged in the aforesaid indictment, including all statements made by him before said grand juries.

18. Unless your petitioner is granted the relief here-

inafter prayed for, in order that his counsel may adequately and freely discuss with your petitioner an' the said witnesses all the facts and circumstances relating to the matters and things alleged in said indictment, including all statements made by them before said grand juries, he will be unable adequately to present his defense to the aforesaid indictment, will be deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States, and will be deprived of a fair and impartial trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

Prayer for Relief.

Wherefore, your petitioner prays that this Honorable Court enter an order granting each and all of the prayers for relief hereinafter set forth, which prayers for relief are severally and separately presented to this Court by your petitioner:

(a) Releasing or finding to have been terminated or finding to be of no force and effect the oath purporting to bind your petitioner to secrecy, taken before the grand jury for the June Term, 1939, extended for the July Term, 1939;

(b) Releasing or finding to have been terminated or finding to be of no force and effect the oath purporting to bind your petitioner to secrecy, taken before the grand jury for the July Term, 1939;

(c) Releasing or finding to have been terminated or finding to be of no force and effect the oaths taken before the grand jury for the June Term, 1939, extended for the July Term, 1939, purporting to bind witnesses other than your petitioner to secrecy, so as to permit your petitioner and his counsel to interview said witnesses and so as to permit any such witnesses who may wish to do so freely to discuss with your petitioner and his counsel all of the facts and circumstances within their knowledge relating to the matters and things alleged in said indictment, including statements made by them with respect to said matters before said grand jury;

63 (d) Releasing or finding to have been terminated or finding to be of no force and effect the oaths taken before the grand jury for the July Term, 1939, purporting to bind witnesses other than your petitioner to secrecy, so as to permit your petitioner and his counsel to inter-

view said witnesses and so as to permit any such witnesses who may wish to do so freely to discuss with your petitioner and his counsel all of the facts and circumstances within their knowledge relating to the matters and things alleged in said indictment, including statements made by them with respect to said matters before said grand jury;

(e) Releasing, terminating or finding to have been terminated the oaths purporting to bind to secrecy each grand juror of the grand jury for the June Term, 1939, extended for the July Term, 1939, so as to permit any of such grand jurors as may wish to do so to discuss with your petitioner or his counsel such matters as occurred before said grand jury as they may be willing to discuss except that no grand juror shall be permitted to disclose the vote of the grand jury or of any of the jurors upon the aforesaid indictment or the discussions or deliberations of the grand jurors among themselves;

(f) Releasing, terminating or finding to have been terminated the oaths purporting to bind to secrecy each grand juror of the grand jury for the July Term, 1939 so as to permit any such grand jurors as may wish to do so to discuss with your petitioner or his counsel such matters as occurred before said grand jury as they may be willing

to discuss except that no grand juror shall be permitted to disclose the vote of the grand jury or of any of the jurors upon the aforesaid indictment or the discussions or deliberations of the grand jurors among themselves;

(g) Releasing, terminating or finding to have been terminated the oaths purporting to bind persons other than grand jurors, witnesses and attorneys who were present in the grand jury room during the proceedings of the grand jury for the June Term, 1939, extended for the July Term, 1939, so as to permit any such person who may wish to do so freely to discuss with your petitioner and his counsel such matters as occurred before said grand jury as he may be willing to discuss;

(h) Releasing, terminating or finding to have been terminated the oaths purporting to bind persons other than grand jurors, witnesses and attorneys who were present in the grand jury room during the proceedings of the grand jury for the July Term, 1939, so as to permit any such person who may wish to do so freely to discuss with your petitioner and his counsel such matters as occurred before said grand jury as he may be willing to discuss;

(i) Giving your petitioner access to the transcript, minutes and notes of the proceedings of the grand jury for the June Term, 1939, extended for the July Term, 1939;

(j) Giving your petitioner access to the transcript, minutes and notes of the proceedings of the grand jury for the July Term, 1939;

(k) Giving your petitioner access to the transcript, minutes and notes of the proceedings of the grand jury for the June Term, 1939, extended for the July Term, 1939, relating to the testimony of your petitioner:

(1) Giving your petitioner access to the transcript, minutes and notes of the proceedings of the grand jury for the July Term, 1939, relating to the testimony of your petitioner;

(m) Granting such other and further relief as to the court may seem proper.

David Baron,
Attorney for William Molasky.
Petitioner.

State of Missouri, } ss:
County of _____ }

William Molasky, being first duly sworn, on oath deposes and says that he is the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true.

William Molasky.

Subscribed and sworn to before me this 24 day of Oct., 1939.

Robt. A. Roessel,
Notary Public.

(Seal)

My commission expires 9/17/43.

84 And afterwards, to wit, on the 7th day of November, A. D. 1939, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

85 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

Entered
Nov. 7,
1939.

• • (Caption—31762, 60, 63, 64, 65, 66, 67, 68) • •

ORDER.

This matter having come on to be heard upon the several petitions for an order releasing oaths of secrecy and for other relief, filed by certain of the defendants in the above numbered indictments, and the Court having read said petitions and the briefs filed in support of and in opposition to said petitions, having heard the argument of counsel and being fully advised in the premises,

It Is Hereby Ordered that the prayers of each of the said petitions be, and the same are hereby denied, except as hereinafter provided:

The United States Attorney for the Northern District of Illinois having consented, the individual defendants in the above numbered indictments who appeared as witnesses before the grand jury for the June Term, 1939, extended for the July Term, 1939, and the grand jury for the July Term, 1939, or either of them, are hereby permitted to disclose to their respective counsel all matters within their knowledge concerning the issues and facts involved in the

above numbered indictments, including the testimony
86 of the said respective individual defendants before either of the said grand juries; provided, however, that such permission shall not extend to or include the past or present officers, agents, and employees of the corporate defendants named in the above numbered indictments who testified before either of the said grand juries, other than those officers, agents, and employees who are named as individual defendants to said indictments.

Enter:

James H. Wilkersen,
*Judge of the United States District Court
for the Northern District of Illinois.*

Dated November 7, 1939.

Objections and exceptions by the petitioners, and each of them, who are defendants in the above numbered indictments are hereby noted to the entry of the foregoing order and every part thereof except the portion thereof allowing the said individual defendants to disclose to their respec-

tive counsel the issues and facts involved in the above entitled indictments as set forth hereinabove. Said petitioners are allowed 60 days for the filing of a bill of exceptions to the foregoing order.

James H. Wilkerson,
*Judge of the United States District Court
 for the Northern District of Illinois.*

Filed
 Dec. 20.
 1939. 172 And on, to wit, the 20th day of December, A. D. 1939 came the defendants by their attorneys and filed in the Clerk's office of said Court certain Bill of Exceptions (in the matter of Oaths of Secrecy) in words and figures following, to wit:

173 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

United States of America

vs.

Moses L. Annenberg *et al.*

In Re: Grand Jury Proceedings.
 In the Matter of the Oaths of Secrecy of Witnesses and Others Before the Grand Jury for the June Term, 1939, Extended for the July Term, 1939, and the Grand Jury for the July Term, 1939; the Oaths of Secrecy of the Grand Jurors, Etc.

Indictment
 No. 31760.

BILL OF EXCEPTIONS.

Be It Remembered, that, heretofore, to-wit, on the 30th day of October, A. D. 1939, the defendants, and each of them, to the above numbered indictments, by their respective attorneys, filed herein their verified petitions for an order releasing oaths of secrecy and for other relief as follows:

Said petition of James M. Ragen and James M. Ragen, Jr. appears on Pages 28-43 of the Printed Record.

Said petition of Arnold W. Kruse and Lester A. Kruse appears on pages 43-53 of the Printed Record.

Said petition of William Molasky appears on pages 54-62 of the Printed Record.

224 Be It Further Remembered, that the aforesaid petitions, and each of them, came on to be heard before the Honorable James H. Wilkerson, one of the judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, and, thereafter, the said Judge of said Court on, to-wit, the 7th day of November, A. D. 1939, in ruling upon said petitions, rendered, in open court, the following decision upon the aforesaid petitions and each of them:

225 The Court: Well, I have gone over these motions, the briefs which have been filed in support of them. As I understand the petitions, they pray for an order releasing the oath of secrecy taken by the defendants and other witnesses when appearing before the grand jurors who returned the indictments, for an order releasing the oath of secrecy taken by the grand jurors, except with reference to the votes of the grand jurors in their deliberations, and for leave to inspect such parts of the minutes of the grand jurors as bear upon certain proposed pleas in abatement, and pleas of immunity which the defendants desire to prepare and file. I shall not repeat here the grounds which have been urged in support of those motions. It is sufficient to say that they have been carefully considered, and the authorities cited by counsel on both sides have been examined.

It might be well to make one or two statements, as to the correctness of which there would appear to be no doubt. The oath of secrecy does not prevent a witness from disclosing facts concerning the case, provided he does not undertake to narrate what took place before the grand jury.

So far as the defendants who make the claim that they are entitled to immunity against the prosecution covered by the indictments because they were required to give testimony as to certain matters, transactions and things

before the so-called monopoly grand jury, there can
226 be no doubt that a defendant, who claims that he has received immunity by being required to testify before the grand jury has the right to disclose to anybody, I would think, because if he can disclose to his lawyer, and to make pleas, that is a general disclosure, he is entitled to disclose

all the matters, transactions and things he was examined about before the grand jury.

Now, as to the other request for an inspection of the minutes of the grand jury and for the release of the oath of the other witnesses, then the defendants, I have reached the conclusion that the questions presented there are of more far-reaching importance than the particular cases which are before the court. The arguments which are advanced in support of these motions would change radically our practice with reference to secrecy of grand jury proceedings, and I have not found in the papers before me in these cases any extraordinary situation which would warrant the court in departing from the general practice in that respect.

With the exception of what I have said as to the defendants who claim immunity, the motions will be overruled.

227 And the Court on, to-wit, the 7th day of November, A. D. 1939, entered the following order denying the prayer of each of said petitions, except as provided in said order:

Said order appears on pages 63-64 of the Printed Record.

230 To which ruling, decision and order of the Court denying the prayers of the aforesaid petitions except as provided in said order, and each of them, the defendants by their attorneys then and there severally excepted.

And forasmuch as the matters set forth do not fully appear of record, the defendants, and each of them, by their respective attorneys tender this bill of exceptions, and pray that the same may be signed, sealed, settled and allowed by the Court, pursuant to the provision therefor contained in the foregoing order, which is done accordingly, in open Court, this 20th day of December, A. D. 1939.

James H. Wilkerson, (Seal)
United States District Judge.

Approved:

William J. Campbell,
United States Attorney.

232 And afterwards, to wit, on the 20th day of Decem-
ber, A. D. 1939, being one of the days of the regular
December term of said Court, in the record of proceedings
thereof, in said entitled cause, before the Honorable James
H. Wilkerson, District Judge, appears the following entry,
to wit:

Entered
Dec. 20,
1939.

233 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Wednesday, December 20, A. D. 1939.

Present: Honorable James H. Wilkerson, Judge.

United States of America

vs.

William Molasky, Arnold W.
Kruse, Lester A. Kruse, James
M. Ragen, James M. Ragen, Jr.,
and The Consensus Publishing
Company, an Illinois corpora-
tion.

No. 31760.

This day come the defendants by their attorneys and
present herein the defendants' bill of exceptions, which
bill of exceptions is approved and signed by the Court and
ordered by the Court to be filed by the Clerk of this Court.

87 And on, to wit, the 15th day of November, A. D. 1939,
came William Molasky by his attorneys and filed in the
Clerk's office of said Court certain Plea in Abatement
(No. 1) in words and figures following, to wit:

Filed
Nov. 15,
1939.

88 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

PLEA IN ABATEMENT.

No. 1.

Now comes William Molasky, one of the defendants to
the above numbered indictment, by his attorney, and pre-
sents this his first plea in abatement to said indictment

numbered 31760 returned herein on the 22nd day of August, 1939, by the grand jury for the June Term, 1939, extended for the July Term, 1939, and to each and every count thereof, and prays the Court to abate and quash said indictment, and each and every count thereof, for the reason that during the investigation by said grand jury which preceded the return of said indictment and on the basis of which said indictment was returned, there were present in the room set aside for and then being used by said grand jury, and at times when said grand jury was convened and in session, and when witnesses were present and were testifying before said grand jury under oath, persons not authorized by law to be there present, to the great and substantial prejudice of this defendant, all as more fully hereinafter set forth:

89 1. The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor be deprived of life, liberty or property without due process of law. . . ."

2. Section 310 of Title 5, United States Code, provides as follows:

"Conduct of legal proceedings. The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. (June 30, 1906, c. 3935, 34 Stat. 816.)"

3. Section 315 of Title 5, United States Code, provides as follows:

"Appointment and oath of special attorneys or counsel. Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of

the appointment may require; and shall take the oath
90 required by law to be taken by the district attorneys,
and shall be subject to all the liabilities imposed upon
them by law. Foreign counsel employed by the Attorney
General in special cases shall not be required to take the
oath required by this section. (R. S. § 366; Feb. 27, 1925,
c. 364, Title II, 43 Stat. 1029.)"

4. Said grand jury for the June Term, 1939 was im-
paneled and sworn on the 5th day of June, 1939, and forth-
with began to investigate alleged violations of certain
Revenue Acts of the United States on the part of defend-
ant Moses L. Annenberg and others. The conduct of said
investigation was in charge of William J. Campbell,
United States Attorney for the Northern District of Illi-
nois, and aiding and assisting said United States Attorney
were Austin Hall, Assistant United States Attorney for
the Northern District of Illinois, Earl C. Crouter, Special
Assistant to the Attorney General E. Riley Campbell,
Special Assistant to the United States Attorney, and Sam-
uel Klaus, Special Assistant to the United States Attor-
ney. Said Crouter, said E. Riley Campbell and said Klaus
participated in the conduct of said investigation under the
authority of certain commissions issued by the Attorney
General of the United States.

5. In addition to said United States Attorney and to
said Hall, said Crouter, said E. Riley Campbell, and said
Klaus, there were present in the grand jury room on nu-
merous occasions while said grand jury was in session
91 and while said investigation resulting in the return of
the indictment in this cause was in progress, and wit-
nesses called in said investigation were present and were
testifying under oath before said grand jury, one James V.
Hayes, one George S. Robinson, and one Sam E. Neel.
The presence of said persons in said grand jury room on
said occasions was unauthorized and contrary to law and
prejudicial to this defendant, as hereinafter set forth.
The knowledge of this defendant that said persons were
so present in said grand jury room as aforesaid is based
upon the following, among other facts:

(a) that each of said persons filed with the Clerk of
this Court oaths referring to letters purporting to author-
ize him to assist in the investigation and prosecution of
alleged violations of the Revenue Acts of the United
States with grand jury authority;

(b) that said Hayes has stated that he and one or both of said other persons were present in said grand jury room during said investigation and while witnesses were testifying before said grand jury.

6. Defendant alleges that said James V. Hayes, said George S. Robinson and said Sam E. Neel did not in fact conduct or participate or assist in any way in the conduct of said investigation, and did not intend to conduct or participate or assist in any way in the conduct of said investigation, but were present in said grand jury room as observers in order that they might view the proceedings

before said grand jury and hear and inform themselves of the evidence heard by said grand jury. The

92 knowledge of this defendant that said persons did not conduct or participate or assist in the conduct of said investigation, or intend so to do, and were present in said grand jury room as such observers is based upon the following, among other facts:

(a) that none of said persons participated or assisted in any way in the conduct of said investigation on any of the occasions when this defendant was present as a witness testifying before said grand jury;

(b) that none of said persons participated or assisted in any way in the conduct of said investigation on the occasions when other defendants to this indictment were present as witnesses testifying before said grand jury, as shown by their verified pleas in abatement in this cause;

(c) that said United States Attorney has stated that said persons would be present in said grand jury room at and during said investigation as observers;

(d) that the Assistant Attorney General in charge of the Anti-Trust Division of the Department of Justice stated that one or more of said persons were present in said grand jury room as observers to obtain information to be used in separate anti-trust investigations and proceedings; and

(e) that said Hayes has stated that he and one or both of said other persons were present at the times aforesaid in said grand jury room as observers.

7. Neither said Hayes, nor said Robinson, nor said Neel was the Attorney General of the United States, 93 or an officer of the Department of Justice, or the United States Attorney, or an Assistant United States Attorney, or a grand juror or witness. There have been

filed in the office of the Clerk of this Court certain oaths (which are by this reference made a part hereof) subscribed to, respectively, by the aforementioned Hayes, Robinson and Neel, which said oaths refer to letters issued by the Attorney General of the United States purporting to authorize said Hayes, said Robinson and said Neel to assist in the investigation and prosecution of alleged violations of the Revenue Acts of the United States with grand jury authority. Neither said purported letters of authority nor any copies thereof are on file in the office of the Clerk of this Court. The United States Attorney has stated in open Court that neither said purported letters of authority nor any copies thereof are on file in his office. And, though requested, neither said letters nor any copies thereof have been made available to this defendant. But defendant says that said purported letters of authority did not in fact authorize, and were never intended to authorize or direct said persons or any of them to conduct or to participate or assist in the conduct of any such investigation and that said purported letters of authority were in fact a mere sham, and the aforesaid oaths were executed and were filed in the office of the Clerk of this Court as aforesaid for the purpose and with the intention of having it appear upon the record, contrary to the fact, that said persons were commissioned as required by 94 law to conduct or to participate or assist in the conduct of the investigation before said grand jury which resulted in the return of the indictment in this cause. Defendant further says that said purported letters of authority did not and could not, pursuant to the statutes of the United States in such case made and provided, lawfully authorize said persons or any of them to appear before said grand jury in said grand jury room during said investigation as such observers.

8. Defendant alleges that said Hayes, said Robinson and said Neel were present before said grand jury as observers as aforesaid for the purpose of obtaining evidence to be used in another and different investigation or in an investigation before another and different grand jury, which might then or thereafter be called, of matters unrelated to any alleged violations of the Revenue Acts, but involving the same or some of the same defendants.

9. Defendant was substantially and seriously prejudiced by the presence of said unauthorized persons before

said grand jury, as hereinabove alleged, for the reason that the presence of said attorneys representing themselves to the grand jurors to be representatives of the United States and to be authorized to appear before said grand jury, in addition to the presence of at least
95 five other attorneys above mentioned who were present during the proceedings before said grand jury and conducted or assisted in conducting said investigation before said grand jury, did result in said investigation receiving an undue and particular emphasis in the minds of the grand jurors and did convey to said grand jurors and impress upon them an apparent anxiety on the part of the Attorney General of the United States and the Department of Justice that an indictment be found and returned and did prevent the grand jurors from considering fairly and impartially the matters presented to them.

10. The presence in said grand jury room while said grand jury was convened and in session of said Hayes, said Robinson and said Neel was, in view of the facts hereinabove alleged, improper, unfair to this defendant and unlawful. The indictment returned against said defendant was returned by a grand jury which could not lawfully find said indictment in this cause because unauthorized persons were permitted to be present before said grand jury, to the prejudice of this defendant as aforesaid. Defendant was thus deprived of his right to be charged with any alleged criminal acts in accordance with the traditional and orderly processes of law, and was thereby deprived of his constitutional rights to due process of law and to presentment and indictment in accordance with the rights guaranteed to defendant by the Fifth Amendment to the Constitution of the United States.

96 11. Defendant stands ready to verify the allegations contained in this plea in abatement and also alleges that further facts supporting and corroborating said allegations will, upon the trial of this plea in abatement, appear from the testimony of witnesses before said grand jury other than those defendants whose verified pleas in abatement have been filed herein and hereinabove referred to and from the minutes of said grand jury, but defendant says that he has been prevented and precluded from obtaining and alleging such additional and corroborative facts in support of this plea in abatement by

reason of the Court's denial of defendant's petition for release of the oaths of secrecy heretofore taken by the members of said grand jury and said witnesses, and by the Court's denial of leave to defendant to inspect those portions of the minutes of said grand jury bearing upon the matters alleged in this plea in abatement.

Wherefore defendant prays that this, his first plea in abatement, be sustained, and that the aforesaid indictment and each and every count thereof returned against him in this cause be abated, set aside and quashed, and that he be permitted to go hence without day.

David Baron,

*Attorney for William
Molasky, defendant.*

97 United States of America, }
State of Illinois, } ss.
County of Cook.

William Molasky, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

William Molasky.

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

(Seal)

Wayne F. Street,
Notary Public.

98 And on, to wit, the 15th day of November, A. D. 1939, came William Molasky by his attorneys and filed in the Clerk's office of said Court certain Plea In Abatement (No. 2) in words and figures following, to wit:

Filed
Nov. 15,
1939.

99 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

PLEA IN ABATEMENT NO. 2 TO THE FIFTH
COUNT OF SAID INDICTMENT.

Now comes William Molasky, one of the defendants to the above numbered indictment, by his attorney, and presents this his second plea in abatement to the fifth

count of said indictment numbered 31760 returned herein on the 22nd day of August, 1939, by the grand jury for the June Term 1939, extended for the July Term 1939, and prays the Court to abate and quash said fifth count of said indictment for the reason that during the investigation by said grand jury which preceded the return of said fifth count of said indictment, and on the basis of which said fifth count of said indictment was returned, there were present in the room set aside for and then being used by said grand jury and at times when said grand jury was convened and in session and when witnesses were present and were testifying before said grand jury under oath, persons not authorized by law to be there present to the great and substantial prejudice of this 100 defendant, all as more fully hereinafter set forth.

1. The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * * nor be deprived of life, liberty or property without due process of law. * * *"

2. Section 310 of Title 5, United States Code, provides as follows:

"Conduct of legal proceedings. The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. (June 30, 1906, c. 3935, 34 Stat. 816.)"

3. Section 315 of Title 5, United States Code, provides as follows:

"Appointment and oath of special attorneys or counsel. Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the

oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law. Foreign counsel employed by the Attorney General in special cases shall not be required to take the oath required by this section. (R. S. § 366; Feb. 27, 1925, c. 364, Title II, 43 Stat. 1029.)"

101 4. Said grand jury for the June Term 1939 was impaneled and sworn on the 5th day of June, 1939, and forthwith began to investigate alleged violations of certain Revenue Acts of the United States on the part of defendant Moses L. Annenberg, and others. Said investigation was in charge of William J. Campbell, United States Attorney for the Northern District of Illinois, and aiding and assisting said United States Attorney were Austin Hall, Assistant United States Attorney for the Northern District of Illinois, Earl C. Cronter, Special Assistant to the Attorney General, E. Riley Campbell, Special Assistant to the United States Attorney, and Samuel Klaus, Special Assistant to the United States Attorney. Said Cronter, said E. Riley Campbell and said Klaus participated in the conduct of said investigation under the authority of certain commissions issued by the Attorney General of the United States.

5. Neither said commissions nor any copies thereof are on file in the office of the Clerk of this Court. The United States Attorney has stated in open court that neither said commissions nor any copies thereof are on file in his office and, though requested, neither said commissions nor any copies thereof have been made available to this defendant. There have been filed in the office of the Clerk of this Court certain oaths subscribed to, respectively, by the said Cronter, the said E. Riley Campbell and said Klaus, which said oaths refer to letters issued by the Attorney General of the United States authorizing said Cronter, said E.

Riley Campbell and said Klaus to assist in the investigation and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 by Moses Louis Annenberg, The Cecelia Company and others in the Northern District of Illinois, with grand jury authority. Copies of said oaths, subscribed by said Cronter, said E. Riley Campbell and said Klaus and filed as aforesaid in the office of the Clerk of this Court, are hereto attached, marked Exhibits "A", "B" and "C", respectively, and made part hereof. Defendant alleges

that the authorities conferred upon said Crouter, said E. Riley Campbell and said Klaus, respectively, by said letters, is identical with that described in the above mentioned oaths and not otherwise.

6. Neither said Crouter, nor said E. Riley Campbell, nor said Klaus was the Attorney General of the United States, or an officer of the Department of Justice, or the United States Attorney, or an Assistant United States Attorney, or a grand juror, or witness. Said Crouter, said E. Riley Campbell and said Klaus were and each of them was without any authority to conduct proceedings before said grand jury, or to participate or assist in the conduct of any investigation of any alleged violations of law before said grand jury, or to be present before said grand jury, except as each of them was specifically authorized and directed by their respective commissions above referred to. Said commissions were and are the sole and only authorizations to said Crouter, said E. Riley Campbell and said Klaus to be present before said grand jury or to conduct or to participate or assist in any way in the conduct of proceedings before said grand jury, and none of them was in fact directed or authorized to investigate the alleged offenses set out in said fifth count of the indictment returned in this cause.

7. Notwithstanding the limited and restricted authority granted in the aforesaid commissions, and notwithstanding the fact that neither said Crouter, said E. Riley Campbell, nor said Klaus was authorized to be present before said grand jury while said grand jury was investigating any matters except alleged violations of said Revenue Acts specified in their respective commissions, or to conduct or participate or assist in the conduct of proceedings before said grand jury concerning any matters except such alleged violations of said Revenue Acts, said Crouter, said E. Riley Campbell and said Klaus were present before said grand jury during the investigation of the matters and things upon which said fifth count of said indictment was found and returned, and did conduct or participate and assist in the conduct of the proceedings before said grand jury and in presenting to said grand jury the evidence upon which said fifth count of said indictment in this cause was predicated. The knowledge of this defendant that said persons were so present in said grand jury room as aforesaid, and did conduct or par-

ticipate and assist in the conduct of the proceedings before said grand jury and in presenting such evidence is based upon the following, among other facts:

(a) that one or more of said persons were present in said grand jury room and did participate and assist in the conduct of the proceedings before said grand jury on occasions when this defendant appeared as a witness before said grand jury and testified concerning matters and

things charged as alleged violations of law in and by 104 said fifth count of said indictment;

(b) that one or more of said persons were present in said grand jury room and did participate and assist in the conduct of the proceedings before said grand jury on numerous occasions when other defendants to said indictment were present and testifying as witnesses before said grand jury and testified concerning matters and things charged as alleged violations of law in and by said fifth count of said indictment, as shown by their verified pleas in abatement filed in this cause;

(c) that said United States Attorney has stated in open court that said Klaus was present and participated in the conduct of the proceedings of said grand jury which found and returned said fifth count of said indictment.

8. The alleged violation of law charged in said fifth count of said indictment are not violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 or 1938, or any of them.

9. The presence of said Crouter, said E. Riley Campbell and said Klaus in the grand jury room while the grand jury was convened and in session and investigating the alleged offenses set forth in said fifth count of said indictment and the participation or assistance of said persons, or any of them, in the conduct of the proceedings before said grand jury as aforesaid was, in view of the facts hereinabove alleged, improper, unfair to this defendant, and unlawful. Said fifth count of said indictment returned against this defendant was returned by a grand jury which could not lawfully find and return said fifth count of said

indictment because said unauthorized persons were 105 permitted to be present before said grand jury and participated and assisted in the conduct of the proceedings before said grand jury to the prejudice of this defendant.

10. This defendant was substantially and seriously prejudiced by the presence of said unauthorized persons

before said grand jury and by their participation and assistance in the proceedings before said grand jury as hereinabove alleged, for the reason that they unlawfully assisted and aided such investigation and persuaded said grand jury to find and return said fifth count of said indictment when they were without lawful authority so to do.

11. Defendant was thus deprived of his right to be charged with any alleged criminal acts in accordance with the traditional and orderly processes of law, and was thereby deprived of his constitutional rights to due process of law and to presentment and indictment in accordance with the rights guaranteed to defendant by the Fifth Amendment to the Constitution of the United States.

12. Defendant stands ready to verify the allegations contained in this plea in abatement, and also alleges that further facts supporting and corroborating said allegations will, upon the trial of this plea in abatement, appear from the testimony of witnesses before said grand jury other than those defendants whose verified pleas in abatement have been filed herein and hereinabove referred to and from the minutes of said grand jury, but defendant says that he has been prevented and precluded from obtaining and alleging such additional and corroborative facts in support of this plea in abatement by reason of

the Court's denial of defendant's petition for release 106 of the oaths of secrecy heretofore taken by the members of said grand jury and said witnesses, and by the Court's denial of leave to defendant to inspect those portions of the minutes of said grand jury bearing upon the matters alleged in this plea in abatement.

WHEREFORE, defendant prays that this, his second plea in abatement to the fifth count of said indictment be sustained, and that the aforesaid fifth count of said indictment returned against him in this cause be abated, set aside and quashed, and that he be permitted to go hence without day as to all alleged violations of law charged in and by said fifth count of said indictment.

David Baron,
Attorney for William Molasky,
Defendant.

107 United States of America }
 State of Illinois } ss.
 County of Cook }

William Molasky, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

William Molasky.

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Wayne F. Swonk,
Notary Public.

(Seal)

108

EXHIBIT "A".

I, Earl C. Crouter, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will sell and faithfully discharge the duties of the office

Special Assistant to the Attorney General, under authority of letter dated May 11, 1939 to assist in the investigation and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 by Moses Louis Annenberg. The Cecelia Company and others in the Northern District of Illinois with grand jury authority.

on which I am about to enter: So help me God.

(Sign here) Earl C. Crouter

Where born (state only) S. Dak.; Date of Birth Aug. 14, 1903; Whence appointed: Wyo.; State Wyo. County Johnson; Congressional District At Large.

Subscribed and sworn to before me this 17th day of May, A. D. 1939.

William J. Campbell,
Notary Public.

(Seal)

Date of entry upon duty May 17, 1939; residence 4221-43rd St. N. W., Washington, D. C.; Do you receive an annuity under the Civil Service Retirement Act? No.

(Filed Jun 1 1939 At O'Clock Hoyt King Clerk.)

I, E. Riley Campbell, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office

Special Assistant to the United States Attorney for the Northern District of Illinois, under authority of letter dated May 11, 1939 to assist in the investigation and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 by Moses Louis Annenberg, The Cecelia Company and others in the Northern District of Illinois, with grand jury authority

on which I am about to enter; So help me God.

(Sign here) E. Riley Campbell,

Where born (State only) Mo.; Date of birth Dec. 24, 1899; Whence appointed: Chicago; State Illinois County Cook; Congressional District Tenth.

Subscribed and sworn to before me this 17th day of May, A. D. 1939.

William J. Campbell,
Notary Public.

(Seal)

Date of entry upon duty May 17, 1939; Residence Chicago, Illinois; Do you receive an annuity under the Civil Service Retirement Act? No.

(Filed Jun 1 1939 At _____ O'Clock _____ Hoyt King Clerk.)

I, Samuel Klaus, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office

Special Assistant to the United States Attorney, under authority of letter dated May 11, 1939 to assist in the in-

investigation and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 by Moses Louis Annenberg, The Cecelia Company and others in the Northern District of Illinois, with grand jury authority.

on which I am about to enter; So help me God.

(Sign here) Samuel Klaus.

Where born (State only) New York; Date of Birth August 29, 1904; Whence appointed; Chicago (Northern Ill.); State N. Y. County Kings; Congressional District 6th N. Y.

Subscribed and sworn to before me this 17th day of May, A. D. 1939.

William J. Campbell,
Notary Public.

(Seal)

Date of entry upon duty May 17, 1939; Residence Brooklyn, N. Y.; Do you receive an annuity under the Civil Service Retirement Act? No.

(Filed Jun 1 1939 At O'Clock Hoyt King Clerk.)

111 And on, to wit, the 15th day of November A. D. 1939 came the defendants Arnold W. and Lester A. Kruse by their attorneys and filed in the Clerk's office of said Court Plea in Abatement No. 1 and Plea in Abatement No. 2 in words and figures following, to wit:

Filed
Nov. 15,
1939.

112 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

PLEA IN ABATEMENT.

No. 1.

Now come Arnold W. Kruse and Lester A. Kruse, defendants to the above numbered indictment, by their attorneys, and present this their first plea in abatement to said indictment Number 31760 returned herein on the 22nd day of August, 1939, by the grand jury for the June Term 1939, extended for the July Term 1939, and to each and every count thereof, and pray the Court to abate and quash said indictment, and each and every count thereof, for the reason that during the investigation by said grand

jury which preceded the return of said indictment and on the basis of which said indictment was returned, there were present in the room set aside for and then being used by said grand jury, and at times when said grand jury was convened and in session, and when witnesses were present and were testifying before said grand jury under oath, persons not authorized by law to be there present, to
 113 the great and substantial prejudice of these defendants, all as more fully hereinafter set forth:

1. The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * * nor be deprived of life, liberty or property without due process of law. * * *"

2. Section 310 of Title 5, United States Code, provides as follows:

"Conduct of legal proceedings. The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. (June 30, 1906, c. 3935, 34 Stat. 816.)"

3. Section 315 of Title 5, United States Code, provides as follows:

"Appointment and oath of special attorneys or counsel. Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law. Foreign counsel employed by the Attorney Gen-
 114 eral in special cases shall not be required to take the oath required by this section. (R. S. Sec. 366; Feb. 27, 1925, c. 364, Title II, 43 Stat. 1029.)"

4. Said grand jury for the June Term 1939 was im-

paneled and sworn on the 5th day of June, 1939, and forthwith began to investigate alleged violations of certain revenue acts of the United States on the part of defendant Moses L. Annenberg and others. The conduct of said investigation was in charge of William J. Campbell, United States Attorney for the Northern District of Illinois, and aiding and assisting said United States Attorney were Austin Hall, Assistant United States Attorney for the Northern District of Illinois, Earl C. Crouter, Special Assistant to the Attorney General, E. Riley Campbell, Special Assistant to the United States Attorney, and Samuel Klaus, Special Assistant to the United States Attorney. Said Crouter, said E. Riley Campbell and said Klaus participated in the conduct of said investigation under the authority of certain commissions issued by the Attorney General of the United States.

5. In addition to said United States Attorney and to said Hall, said Crouter, said E. Riley Campbell, and said Klaus, there were present in the grand jury room on numerous occasions while said grand jury was in session and while said investigation resulting in the return of the indictment in this cause was in progress, and witnesses called in said investigation were present and were testifying under oath before said grand jury, one James V. Hayes, one George S. Robinson, and one Sam E. Neel. The presence of said persons in said grand jury room on said occasions was unauthorized and contrary to law and 115 prejudicial to these defendants, as hereinafter set forth. The knowledge of these defendants that said persons were so present in said grand jury room as aforesaid is based upon the following, among other facts:

(a) that each of said persons filed with the Clerk of this Court oaths referring to letters purporting to authorize him to assist in the investigation and prosecution of alleged violations of the Revenue Acts of the United States with grand jury authority;

(b) that said Hayes has stated that he and one or both of said other persons were present in said grand jury room during said investigation and while witnesses were testifying before said grand jury.

6. Defendants allege that said James V. Hayes, said George S. Robinson and said Sam E. Neel did not in fact conduct or participate or assist in any way in the conduct of said investigation, and did not intend to conduct or participate or assist in any way in the conduct of said

investigation, but were present in said grand jury room as observers in order that they might view the proceedings before said grand jury and hear and inform themselves of the evidence heard by said grand jury. The knowledge of these defendants that said persons did not conduct or participate or assist in the conduct of said investigation, or intend so to do, and were present in said grand jury room as such observers is based upon the following, among other facts:

(a) that none of said persons participated or assisted in any way in the conduct of said investigation on any of the occasions when these defendants were present as witnesses testifying before said grand jury;

116 (b) that none of said persons participated or assisted in any way in the conduct of said investigation on the occasions when other defendants to this indictment were present as witnesses testifying before said grand jury, as shown by their verified pleas in abatement in this cause;

(c) that said United States Attorney has stated that said persons would be present in said grand jury room at and during said investigation as observers;

(d) that the Assistant Attorney General in charge of the Anti-Trust Division of the Department of Justice stated that one or more of said persons were present in said grand jury room as observers to obtain information to be used in separate anti-trust investigations and proceedings; and

(e) that said Hayes has stated that he and one or both of said other persons were present at the times aforesaid in said grand jury room as observers.

7. Neither said Hayes, nor said Robinson, nor said Neel was the Attorney General of the United States, or an officer of the Department of Justice, or the United States Attorney, or an Assistant United States Attorney, or a grand juror or witness. There have been filed in the office of the clerk of this Court certain oaths (which are by this reference made a part hereof) subscribed to, respectively, by the aforementioned Hayes, Robinson and Neel, which said oaths refer to letters issued by the Attorney General of the United States purporting to authorize said Hayes, said Robinson and said Neel to assist in the investigation and prosecution of alleged violations of the Revenue Acts of the United States with grand jury authority. Neither said purported letters of authority nor any copies thereof

are on file in the office of the Clerk of this Court. The 117 United States Attorney has stated in open Court that neither said purported letters of authority nor any copies thereof are on file in his office. And though requested, neither said letters nor any copies thereof have been made available to these defendants. But defendants say that said purported letters of authority did not in fact authorize, and were never intended to authorize or direct said persons or any of them to conduct or to participate or assist in the conduct of any such investigation and the aforesaid oaths were executed and were filed in the office of the Clerk of this Court as aforesaid for the purpose and with the intention of having it appear upon the record, contrary to the fact, that said persons were commissioned as required by law to conduct or to participate or assist in the conduct of the investigation before said grand jury which resulted in the return of the indictment in this cause. Defendants further say that said purported letters of authority did not and could not, pursuant to the statutes of the United States in such case made and provided, lawfully authorize said persons or any of them to appear before said grand jury in said grand jury room during said investigation as such observers.

8. Defendants allege that said Hayes, said Robinson and said Neel were present before said grand jury as observers as aforesaid for the purpose of obtaining evidence to be used in another and different investigation or in an investigation before another and different grand jury, which might then or thereafter be called, of 118 matters unrelated to any alleged violations of the Revenue Acts, but involving the same or some of the same defendants.

9. Defendants were substantially and seriously prejudiced by the presence of said unauthorized persons before said grand jury, as hereinabove alleged, for the reason that the presence of said attorneys representing themselves to the grand jurors to be representatives of the United States and to be authorized to appear before said grand jury, in addition to the presence of at least five other attorneys above mentioned who were present during the proceedings before said grand jury and conducted or assisted in conducting said investigation before said grand jury, did result in said investigation receiving an undue and particular emphasis in the minds of the grand jurors and did

convey to said grand jurors and impress upon them an apparent anxiety on the part of the Attorney General of the United States and the Department of Justice that an indictment be found and returned and did prevent the grand jurors from considering fairly and impartially the matters presented to them.

10. The presence in said grand jury room while said grand jury was convened and in session of said Hayes, said Robinson and said Neel was, in view of the facts hereinabove alleged, improper, unfair to these defendants and unlawful. The indictment returned against said defendants was returned by a grand jury which could not lawfully find said indictment in this cause because unauthorized

persons were permitted to be present before said grand jury, to the prejudice of these defendants as aforesaid. Defendants were thus deprived of their right to be charged with any alleged criminal acts in accordance with the traditional and orderly processes of law, and were thereby deprived of their constitutional rights to due process of law and to presentment and indictment in accordance with the rights guaranteed to defendants by the Fifth Amendment to the Constitution of the United States.

11. Defendants stand ready to verify the allegations contained in this plea of abatement and also allege that further facts supporting and corroborating said allegations will, upon the trial of this plea in abatement, appear from the testimony of witnesses before said grand jury other than those defendants whose verified pleas in abatement have been filed herein and hereinabove referred to and from the minutes of said grand jury, but defendants say that they have been prevented and precluded from obtaining and alleging such additional and corroborative facts in support of this plea in abatement by reason of the Court's denial of defendants' petition for release of the oaths of secrecy heretofore taken by the members of said grand jury and said witnesses, and by the Court's denial of leave to defendants to inspect those portions of the minutes of said grand jury bearing upon the matters alleged in this plea in abatement.

Wherefore defendants pray that this, their first plea in abatement, be sustained, and that the aforesaid indictment and each and every count thereof returned against them in this cause be abated, set aside and

quashed, and that they be permitted to go hence without day.

Miller, Gorham, Wescott & Adams,
*Attorneys for Arnold W. Kruse and
Lester A. Kruse, defendants.*

121 United States of America, }
State of Illinois. } ss.
County of Cook.

Arnold W. Kruse, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

Arnold W. Kruse.

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Marco Vladiniroff,
Notary Public.

(Seal)

122 United States of America, }
State of Illinois. } ss.
County of Cook.

Lester A. Kruse, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

Lester A. Kruse.

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Marco Vladinoroff,
Notary Public.

(Seal)

123 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—31760) • •

PLEA IN ABATEMENT NO. 2 TO THE FIFTH
COUNT OF SAID INDICTMENT.

Now come Arnold W. Kruse and Lester A. Kruse, defendants to the above numbered indictment, by their attorneys, and present this their second plea in abatement

to the fifth count of said indictment numbered 31760 returned herein on the 22nd day of August, 1939, by the grand jury for the June Term 1939, extended for the July Term 1939, and pray the Court to abate and quash said fifth count of said indictment for the reason that during the investigation by said grand jury which preceded the return of said fifth count of said indictment, and on the basis of which said fifth count of said indictment was returned, there were present in the room set aside for and then being used by said grand jury and at times when said grand jury was convened and in session and when witnesses were present and were testifying before said grand jury under oath, persons not authorized by law to be there present, to the great and substantial 124 prejudice of these defendants, all as more fully hereinafter set forth.

1. The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor be deprived of life, liberty or property without due process of law . . ."

2. Section 310 of Title 5, United States Code, provides as follows:

"Conduct of legal proceedings. The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. (June 30, 1906, c. 3935, 34 Stat. 816.)"

3. Section 315 of Title 5, United States Code, provides as follows:

"Appointment and oath of special attorneys or counsel. Every attorney or counsel—or who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys,

as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law. Foreign counsel employed by the Attorney General in special cases shall not be required to take the oath required by this section. (R. S. § 366; Feb. 27, 1925, c. 364, Title II, 43 Stat. 1029.)"

125 4. Said grand jury for the June Term 1939 was impaneled and sworn on the 5th day of June, 1939, and forthwith began to investigate alleged violations of certain Revenue Acts of the United States on the part of defendant Moses L. Annenberg, and others. Said investigation was in charge of William J. Campbell, United States Attorney for the Northern District of Illinois, and aiding and assisting said United States Attorney were Austin Hall, Assistant United States Attorney for the Northern District of Illinois, Earl C. Crouter, Special Assistant to the Attorney General, E. Riley Campbell, Special Assistant to the United States Attorney, and Samuel Klaus, Special Assistant to the United States Attorney. Said Crouter, said E. Riley Campbell and said Klaus participated in the conduct of said investigation under the authority of certain commissions issued by the Attorney General of the United States.

5. Neither said commissions nor any copies thereof are on file in the office of the Clerk of this Court. The United States Attorney has stated in open court that neither said commissions nor any copies thereof are on file in his office and, though requested, neither said commissions nor any copies thereof have been made available to these defendants. There have been filed in the office of the Clerk of this Court certain oaths subscribed to, respectively, by the said Crouter, the said E. Riley Campbell and said Klaus, which said oaths refer to letters issued by the Attorney General of the United States authorizing said Crouter, said E. Riley Campbell and

said Klaus to assist in the investigation and prosecution of alleged violations of the Revenue Acts of 126 1926, 1928, 1932, 1934, 1936 and 1938 by Moses Louis Annenberg, The Cecelia Company and others in the Northern District of Illinois, with grand jury authority. Copies of said oaths, subscribed by said Crouter, said E. Riley Campbell and said Klaus and filed as aforesaid in the office of the Clerk of this Court, are hereto attached, marked Exhibits "A", "B" and "C", respec-

tively, and made part thereof. Defendants allege that the authority conferred upon said Crouter, said E. Riley Campbell and said Klaus, respectively, by said letters, is identical with that described in the above mentioned oaths and not otherwise.

6. Neither said Crouter, nor said E. Riley Campbell, nor said Klaus was the Attorney General of the United States, or an officer of the Department of Justice, or the United States Attorney, or an Assistant United States Attorney, or a grand juror, or witness. Said Crouter, said E. Riley Campbell and said Klaus were and each of them was without any authority to conduct proceedings before said grand jury, or to participate or assist in the conduct of any investigation of any alleged violations of law before said grand jury, or to be present before said grand jury, except as each of them was specifically authorized and directed by their respective commissions above referred to. Said commissions were and are the sole and only authorizations to said Crouter, said E. Riley Campbell and said Klaus to be present before said grand jury or to conduct or to participate or assist in any way in the conduct of proceedings before said grand jury, and none of them was in fact directed or
127 authorized to investigate the alleged offenses set out in said fifth count of the indictment returned in this cause.

7. Notwithstanding the limited and restricted authority granted in the aforesaid commissions, and notwithstanding the fact that neither said Crouter, said E. Riley Campbell, nor said Klaus was authorized to be present before said grand jury while said grand jury was investigating any matters except alleged violations of said Revenue Acts specified in their respective commissions, or to conduct or participate or assist in the conduct of proceedings before said grand jury concerning any matters except such alleged violations of said Revenue Acts, said Crouter, said E. Riley Campbell and said Klaus were present before said grand jury during the investigation of the matters and things upon which said fifth count of said indictment was found and returned, and did conduct or participate and assist in the conduct of the proceedings before said grand jury and in presenting to said grand jury the evidence upon which said fifth count of said indictment in this cause was predicated. The knowledge of these defendants that said persons were so pres-

ent in said grand jury room as aforesaid, and did conduct or participate and assist in the conduct of the proceedings before said grand jury and in presenting such evidence is based upon the following, among other facts:

(a) that one or more of said persons were present in said grand jury room and did participate and assist in the conduct of the proceedings before said grand jury on numerous occasions when these defendants appeared as witnesses before said grand jury and testified concerning matters and things charged as alleged violations of law in and by said fifth count of said indictment;

(b) that one or more of said persons were present in said grand jury room and did participate and assist in the conduct of the proceedings before said grand jury on numerous occasions when other defendants to said indictment were present and testifying as witnesses before said grand jury and testified concerning matters and things charged as alleged violations of law in and by said fifth count of said indictment, as shown by their verified pleas in abatement filed in this cause;

(c) that said United States Attorney has stated in open court that said Klaus was present and participated in the conduct of the proceedings of said grand jury which found and returned said fifth count of said indictment.

8. The alleged violations of law charged in said fifth count of said indictment are not violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 or 1938, or any of them.

9. The presence of said Cronter, said E. Riley Campbell and said Klaus in the grand jury room while the grand jury was convened and in session and investigating the alleged offenses set forth in said fifth count of said indictment and the participation or assistance of said persons, or any of them, in the conduct of the proceedings before said grand jury as aforesaid was, in view of the facts hereinabove alleged, improper, unfair to these defendants, and unlawful. Said fifth count of said indictment returned against these defendants was returned by a grand jury which could not lawfully find and return said fifth count of said indictment because said unauthorized persons were permitted to be present before
129 said grand jury and participated and assisted in the conduct of the proceedings before said grand jury to the prejudice of these defendants.

10. These defendants were substantially and seriously prejudiced by the presence of said unauthorized persons before said grand jury and by their participation and assistance in the proceedings before said grand jury as hereinabove alleged, for the reason that they unlawfully assisted and aided such investigation and persuaded said grand jury to find and return said fifth count of said indictment when they were without lawful authority so to do.

11. Defendants were thus deprived of their right to be charged with any alleged criminal acts in accordance with the traditional and orderly processes of law, and were thereby deprived of their constitutional rights to due process of law and to presentment and indictment in accordance with the rights guaranteed to defendants by the Fifth Amendment to the Constitution of the United States.

12. Defendants stand ready to verify the allegations contained in this plea in abatement, and also alleged that further facts supporting and corroborating said allegations will, upon the trial of this plea in abatement, appear from the testimony of witnesses before said grand jury other than those defendants whose verified pleas in abatement have been filed herein and hereinabove referred to and from the minutes of said grand jury, but defendants say that they have been prevented and precluded from obtaining and alleging such additional and corroborative facts in support of this plea in abatement by reason of

the Court's denial of defendants' petition for release 130 of the oaths of secrecy heretofore taken by the members of said grand jury and said witnesses, and by the Court's denial of leave to defendants to inspect those portions of the minutes of said grand jury bearing upon the matters alleged in this plea in abatement.

Wherefore, defendants pray that this, their second plea in abatement to the fifth count of said indictment be sustained, and that the aforesaid fifth count of said indictment returned against them in this cause be abated, set aside and quashed, and that they be permitted to go hence without day as to all alleged violations of law charged in and by said fifth count of said indictment.

Miller, Gorham, Wescott & Adams,

*Attorneys for Arnold W. Kruse and
Lester A. Kruse, Defendants.*

131 United States of America }
 State of Illinois } ss.
 County of Cook }

Arnold W. Kruse, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

Arnold Kruse.

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Marco Vladiniroff,
Notary Public.

(Seal)

132 United States of America }
 State of Illinois } ss.
 County of Cook }

Lester A. Kruse, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

Lester A. Kruse.

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Marco Vladiniroff,
Notary Public.

(Seal)

133 EXHIBIT "A".

I, Earl C. Creuter, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will sell and faithfully discharge the duties of the office

Special Assistant to the Attorney General, under authority of letter dated May 11, 1939 to assist in the investigation and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 by Moses

Exhibit "B".

Louis Annenberg, The Cecelia Company and others in the Northern District of Illinois, with grand jury authority.

on which I am about to enter; So help me God.

(Sign here) Earl C. Crouter

Where born (State only) S. Dak.

Date of birth Aug. 14, 1903

Whence appointed: Wyo.

State Wyo. County Johnson

Congressional District At Large

Subscribed and sworn to before me this 17th day of May, A. D. 1939.

William J. Campbell,

(Seal)

Notary Public.

Date of entry upon duty May 17, 1939

Residence 4221—43rd St. N. W., Washington, D. C.

Do you receive an annuity under the Civil Service Retirement Act? No

(Filed Jun 1 1939 At _____ O'Clock _____ Hoyt King Clerk)

EXHIBIT "B".

I, E. Riley Campbell, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; that I will well and faithfully discharge the duties of the office

Special Assistant to the United States Attorney for the Northern District of Illinois, under authority of letter dated May 11, 1939 to assist in the investigation and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 by Moses Louis Annenberg, The Cecelia Company and others in the Northern District of Illinois, with grand jury authority

on which I am about to enter; So help me God.

(Sign here) E. Riley Campbell

Where born (State only) Mo.

Date of birth Dec. 24, 1899

Whence appointed: Chicago

State Illinois County Cook

Congressional District Tenth

Subscribed and sworn to before me this 17th day of May,
A. D. 1939.

William J. Campbell,
Notary Public.

(Seal)

Date of entry upon duty May 17, 1939

Residence Chicago, Illinois

Do you receive an annuity under the Civil Service Retirement Act? No

(Filed Jun 1 1939 at _____ O'Clock _____ Hoyt King,
Clerk)

135

EXHIBIT "C".

I, Samuel Klaus, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office

Special Assistant to the United States Attorney, under authority of letter dated May 11, 1939, to assist in the investigation and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 by Moses Louis Annenberg, The Cecelia Company and others in the Northern District of Illinois, with grand jury authority.

on which I am about to enter; So help me God.

(Sign here) Samuel Klaus

Where born (State only) New York

Date of birth August 29, 1904

Whence appointed; Chicago

(Northern Ill.)

State N. Y. County Kings

Congressional District 6th N. Y.

Subscribed and sworn to before me this 17th day of
May, A. D. 1939.

William J. Campbell,
Notary Public.

(Seal)

Date of entry upon duty May 17, 1939

Residence Brooklyn, N. Y.

Do you receive an annuity under the Civil Service Retirement Act? No

(Filed Jun 1 1939 At _____ O'Clock _____ Hoyt King,
Clerk)

Filed
Nov. 15,
1939.

136 And on, to wit, the 15th day of November A. D. 1939, came James M. Ragen, Sr., and James M. Ragen, Jr., and The Consensus Publishing Co., and filed in the Clerk's office of said Court Plea in Abatement No. 1 and Plea in Abatement No. 2 in words and figures following, to wit:

137 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—31760) • •

PLEA IN ABATEMENT.

No. 1.

Now come Moses L. Annenberg, Jules Taylor, James M. Ragen, James M. Ragen, Jr., Herbert S. Kamin, and The Consensus Publishing Company, a corporation, defendants to the above numbered indictment, by their attorneys, and present this their first plea in abatement to said indictment Number 31760 returned herein on the 22nd day of August, 1939, by the grand jury for the June Term 1939, extended for the July Term 1939, and to each and every count thereof, and pray the Court to abate and quash said indictment, and each and every count thereof, for the reason that during the investigation by said grand jury which preceded the return of said indictment and on the basis of which said indictment was returned, there were present in the room set aside for and then being used by said grand jury, and at times when said grand jury was convened and in session, and when witnesses were present and were testifying before said grand jury under oath, persons not authorized by law to be there present, to the great and substantial prejudice of these defendants, all as more fully hereinafter set forth:

1. The Fifth Amendment to the Constitution of the United States reads as follows:

138 "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, • • • nor be deprived of life, liberty or property without due process of law.
• • •"

2. Section 310 of Title 5, United States Code, provides as follows:

"Conduct of legal proceedings. The Attorney General or any officer of the Department of Justice, or any attor-

ney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. (June 30, 1906, c. 3935, 34 Stat. 816.)"

3. Section 315 of Title 5, United States Code, provides as follows:

"Appointment and oath of special attorneys or counsel. Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law. Foreign counsel employed by the Attorney General in special cases shall not be required to take the oath required by this section. (R. S. § 366; Feb. 27, 1925, c. 364, Title II, 43 Stat. 1029.)"

4. Said grand jury for the June Term 1939 was impaneled and sworn on the 5th day of June, 1939, and forthwith began to investigate alleged violations of certain revenue acts of the United States on the part of defendant Moses L. Annenberg and others. The conduct of said investigation was in charge of William J. Campbell, United States Attorney for the Northern District of Illinois, and aiding and assisting said United States Attorney were Austin Hall, Assistant United States Attorney for the Northern District of Illinois, Earl C. Crouter, Special Assistant to the Attorney General, E. Riley Campbell, Special Assistant to the United States Attorney, and Samuel Klaus, Special Assistant to the United States Attorney. Said Crouter, said E. Riley Campbell and said Klaus participated in the conduct of said investigation under the authority of certain commissions issued by the Attorney General of the United States.

5. In addition to said United States Attorney and to said Hall, said Crouter, said E. Riley Campbell, and said

Klaus, there were present in the grand jury room on numerous occasions while said grand jury was in session and while said investigation resulting in the return of the indictment in this cause was in progress, and witnesses called in said investigation were present and were testifying under oath before said grand jury, one James V. Hayes, one George S. Robinson, and one Sam E. Neel. The presence of said persons in said grand jury room on said occasion was unauthorized and contrary to law and prejudicial to these defendants, as hereinafter set forth. The knowledge of these defendants that said persons were so present in said grand jury room as aforesaid is based upon the following, among other facts:

(a) that each of said persons filed with the Clerk of this Court oaths referring to letters purporting to authorize him to assist in the investigation and prosecution of alleged violations of the Revenue Acts of the United States with grand jury authority;

140 (b) that said Hayes has stated that he and one or both of said other persons were present in said grand jury room during said investigation and while witnesses were testifying before said grand jury.

6. Defendants allege that said James V. Hayes, said George S. Robinson and said Sam E. Neel did not in fact conduct or participate or assist in any way in the conduct of said investigation, and did not intend to conduct or participate or assist in any way in the conduct of said investigation, but were present in said grand jury room as observers in order that they might view the proceedings before said grand jury and hear and inform themselves of the evidence heard by said grand jury. The knowledge of these defendants that said persons did not conduct or participate or assist in the conduct of said investigation, or intend so to do, and were present in said grand jury room as such observers is based upon the following, among other facts:

(a) that none of said persons participated or assisted in any way in the conduct of said investigation on any of the occasions when any of these defendants were present as witnesses testifying before said grand jury;

(b) that none of said persons participated or assisted in any way in the conduct of said investigation on the occasions when other defendants to this indictment were present as witnesses testifying before said grand jury, as shown by their verified pleas in abatement in this cause:

(c) that said United States Attorney has stated that said persons would be present in said grand jury room at and during said investigation as observers;

(d) that the Assistant Attorney General in charge of the Anti-Trust Division of the Department of Justice stated that one or more of said persons were present in said grand jury room as observers to obtain information to be used in separate anti-trust investigations and proceedings;
and

141 (e) that said Hayes has stated that he and one or both of said other persons were present at the times aforesaid in said grand jury room as observers.

7. Neither said Hayes, nor said Robinson, nor said Neel was the Attorney General of the United States, or an officer of the Department of Justice, or the United States Attorney, or an Assistant United States Attorney, or a grand juror or witness. There have been filed in the office of the clerk of this Court certain oaths (which are by this reference made a part hereof) subscribed to, respectively, by the aforementioned Hayes, Robinson and Neel, which said oaths refer to letters issued by the Attorney General of the United States purporting to authorize said Hayes, said Robinson and said Neel to assist in the investigation and prosecution of alleged violations of the Revenue Acts of the United States with grand jury authority. Neither said purported letters of authority nor any copies thereof are on file in the office of the Clerk of this Court. The United States Attorney has stated in open Court that neither said purported letters of authority nor any copies thereof are on file in his office. And though requested, neither said letters nor any copies thereof have been made available to these defendants. But defendants say that said purported letters of authority did not in fact authorize and were never intended to authorize or direct said persons or any of them to conduct or to participate or assist in the conduct of any such investigation and the aforesaid oaths were executed and were filed in the office of the Clerk of this Court as aforesaid for the 142 purpose and with the intention of having it appear upon the record, contrary to the fact, that said persons were commissioned as required by law to conduct or to participate or assist in the conduct of the investigation before said grand jury which resulted in the return of the

indictment in this cause. Defendants further say that said purported letters of authority did not and could not, pursuant to the statutes of the United States in such case made and provided, lawfully authorize said persons or any of them to appear before said grand jury in said grand jury room during said investigation as such observers.

8. Defendants allege that said Hayes, said Robinson and said Neel were present before said grand jury as observers as aforesaid for the purpose of obtaining evidence to be used in another and different investigation or in an investigation before another and different grand jury, which might then or thereafter be called, of matters unrelated to any alleged violations of the Revenue Acts, but involving the same or some of the same defendants.

9. Defendants were substantially and seriously prejudiced by the presence of said unauthorized persons before said grand jury, as hereinabove alleged, for the reason that the presence of said attorneys representing themselves to the grand jurors to be representatives of the United States and to be authorized to appear before said grand jury, in addition to the presence of at least five other attorneys above mentioned who were present during the proceedings before said grand jury and conducted or assisted in conducting said investigation before said grand jury,

did result in said investigation receiving an undue and
143 particular emphasis in the minds of the grand jurors and did convey to said grand jurors and impress upon them an apparent anxiety on the part of the Attorney General of the United States and the Department of Justice that an indictment be found and returned and did prevent the grand jurors from considering fairly and impartially the matters presented to them.

10. The presence in said grand jury room while said grand jury was convened and in session of said Hayes, said Robinson and said Neel was, in view of the facts hereinabove alleged, improper, unfair to these defendants and unlawful. The indictment returned against said defendants was returned by a grand jury which could not lawfully find said indictment in this cause because unauthorized persons were permitted to be present before said grand jury, to the prejudice of these defendants as aforesaid. Defendants were thus deprived of their right to be charged with any alleged criminal acts in accordance with the traditional and orderly processes of law, and were thereby de-

prived of their constitutional rights to due process of law and to presentment and indictment in accordance with the rights guaranteed to defendants by the Fifth Amendment to the Constitution of the United States.

11. Defendants stand ready to verify the allegations contained in this plea in abatement and also allege that further facts supporting and corroborating said allegations will, upon the trial of this plea in abatement, appear from the testimony of witnesses before said grand jury other than those defendants whose verified pleas in abatement

have been filed herein and hereinabove referred to and 144 from the minutes of said grand jury, but defendants say

that they have been prevented and precluded from obtaining and alleging such additional and corroborative facts in support of this plea in abatement by reason of the Court's denial of defendants' petition for release of the oaths of secrecy heretofore taken by the members of said grand jury and said witnesses, and by the Court's denial of leave to defendants to inspect those portions of the minutes of said grand jury bearing upon the matters alleged in this plea in abatement.

Wherefore defendants pray that this, their first plea in abatement, be sustained, and that the aforesaid indictment and each and every count thereof returned against them in this cause be abated, set aside and quashed, and that they be permitted to go hence without day.

Kirkland, Fleming, Green, Martin & Ellis,
Attorneys for the above-named Defendants.

145 United States of America }
State of Illinois } ss.
County of Cook }

Moses L. Annenberg, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

Moses L. Annenberg.

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Zella M. Rose,
Notary Public.

(Seal)

146 United States of America }
 State of Illinois } ss.
 County of Cook }

Jules Taylor, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

Jules Taylor.

Subscribed and sworn to before me this 15th day of November, A. D. 1939.

Wayne F. Swank,
Notary Public.

(Seal)

147 United States of America }
 State of Illinois } ss.
 County of Cook }

James M. Ragen, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

James M. Ragen,

Subscribed and sworn to before me this 13th day of November, A. D. 1939.

Zella M. Rose,
Notary Public.

(Seal)

148 United States of America }
 State of Illinois } ss.
 County of Cook }

James M. Ragen, Jr., being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

James M. Ragen, Jr.

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Wayne F. Swank,
Notary Public.

(Seal)

149 United States of America }
State of Illinois } ss.
County of Cook }

Herbert S. Kamin, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

Herbert S. Kamin.

Subscribed and sworn to before me this 14 day of November, A. D. 1939.

(Seal) Wayne F. Swank,
Notary Public.

150 United States of America }
State of Illinois } ss.
County of Cook }

James M. Ragen, Jr., being first duly sworn, on oath deposes and says that he is Vice-President of The Consensus Publishing Company, a corporation, one of the defendants to the above numbered indictment; that he is authorized to verify this plea in abatement on behalf of said defendant; that he has read the foregoing plea in abatement in behalf of said defendant and knows the contents thereof, and that the same is true.

James M. Ragen, Jr.

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

(Seal) Wayne F. Swank,
Notary Public.

66 IN THE DISTRICT COURT OF THE UNITED STATES,
• • (Caption—31760) • •

PLEA IN ABATEMENT NO. 2 TO THE FIFTH COUNT
OF SAID INDICTMENT.

Now come Moses L. Alnenberg, Jules Taylor, James M. Ragen, James M. Ragen, Jr., Herbert S. Kamin and the Consensus Publishing Company, defendants to the above

numbered indictment, by their attorneys, and present this their second plea in abatement to the fifth count of said indictment numbered 31760 returned herein on the 22nd day of August, 1939, by the grand jury for the June Term 1939, extended for the July Term 1939, and pray the Court to abate and quash said fifth count of said indictment for the reason that during the investigation by said grand jury which preceded the return of said fifth count of said indictment, and on the basis of which said fifth count of said indictment was returned, there were present in the room set aside for and then being used by said grand jury and at times when said grand jury was convened and in session and when witnesses were present and were testifying before said grand jury under oath, persons not authorized by law to be there present, to the great and substantial
67 prejudice of these defendants, all as more fully hereinafter set forth.

1. The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * * nor be deprived of life, liberty or property without due process of law. * * *"

2. Section 310 of Title 5, United States Code, provides as follows:

"Conduct of legal proceedings. The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. (June 30, 1906, c. 3935, 34 Stat. 816.)"

3. Section 315 of Title 5, United States Code, provides as follows:

"Appointment and oath of special attorneys or counsel. Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the

appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law. Foreign counsel employed by the Attorney General in special cases shall not be required to take the oath required by this section. (R. S. § 366; Feb. 27, 1925, c. 364, Title II, 43 Stat. 1029.)”

68 4. Said grand jury for the June Term 1939 was impaneled and sworn on the 5th day of June, 1939, and forthwith began to investigate alleged violations of certain Revenue Acts of the United States on the part of defendant Moses L. Annenberg, and others. Said investigation was in charge of William J. Campbell, United States Attorney for the Northern District of Illinois, and aiding and assisting said United States Attorney were Austin Hall, Assistant United States Attorney for the Northern District of Illinois, Earl C. Crouter, Special Assistant to the Attorney General, E. Riley Campbell, Special Assistant to the United States Attorney, and Samuel Klaus, Special Assistant to the United States Attorney. Said Crouter, said E. Riley Campbell and said Klaus participated in the conduct of said investigation under the authority of certain commissions issued by the Attorney General of the United States.

5. Neither said commissions nor any copies thereof are on file in the office of the Clerk of this Court. The United States Attorney has stated in open court that neither said commissions nor any copies thereof are on file in his office and, though requested, neither said commissions nor any copies thereof have been made available to these defendants. There have been filed in the office of the Clerk of this Court certain oaths subscribed to, respectively, by the said Crouter, the said E. Riley Campbell and Said Klaus, which said oaths refer to letters issued by the Attorney General of the United States authorizing said Crouter, said E. Riley

Campbell and said Klaus to assist in the investigation
69 and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 by Moses Louis Annenberg, The Cecelia Company and others in the Northern District of Illinois, with grand jury authority. Copies of said oaths, subscribed by said Crouter, said E. Riley Campbell and said Klaus and filed as aforesaid in the office of the Clerk of this Court, are hereto attached, marked Exhibits “A”, “B” and “C”, respectively, and made part hereof. Defendants allege that the authority con-

ferred upon said Crouter, said E. Riley Campbell and said Klaus, respectively, by said letters, is identical with that described in the above mentioned oaths and not otherwise.

6. Neither said Crouter, nor said E. Riley Campbell, nor said Klaus was the Attorney General of the United States, or an officer of the Department of Justice, or the United States Attorney, or an Assistant United States Attorney, or a grand juror, or witness. Said Crouter, said E. Riley Campbell and said Klaus were and each of them was without any authority to conduct proceedings before said grand jury, or to participate or assist in the conduct of any investigation of any alleged violations of law before said grand jury, or to be present before said grand jury, except as each of them was specifically authorized and directed by their respective commissions above referred to. Said commissions were and are the sole and only authorizations to said Crouter, said E. Riley Campbell and said Klaus to be present before said grand jury or to conduct or to participate or assist in any way in the conduct of proceedings before said grand jury, and none of them was in fact
70 directed or authorized to investigate the alleged offenses set out in said fifth count of the indictment returned in this cause.

7. Notwithstanding the limited and restricted authority granted in the aforesaid commissions, and notwithstanding the fact that neither said Crouter, said E. Riley Campbell, nor said Klaus was authorized to be present before said grand jury while said grand jury was investigating any matters except alleged violations of said Revenue Acts specified in their respective commissions, or to conduct or participate or assist in the conduct of proceedings before said grand jury concerning any matters except such alleged violations of said Revenue Acts, said Crouter, said E. Riley Campbell and said Klaus were present before said grand jury during the investigation of the matters and things upon which said fifth count of said indictment was found and returned, and did conduct or participate and assist in the conduct of the proceedings before said grand jury and in presenting to said grand jury the evidence upon which said fifth count of said indictment in this cause was predicated. The knowledge of these defendants that said persons were so present in said grand jury room as aforesaid, and did conduct or participate and assist in the conduct of the proceedings before said grand jury and in pre-

senting such evidence is based upon the following, among other facts:

(a) that one or more of said persons were present in said grand jury room and did participate and assist in the conduct of the proceedings before said grand jury on numerous occasions when some of these defendants appeared as witnesses before said grand jury and testified concerning matters and things charged as alleged violations of law in and by said fifth count of said indictment;

(b) that one or more of said persons were present in said grand jury room and did participate and assist in the conduct of the proceedings before said grand jury on numerous occasions when other defendants to said indictment were present and testifying as witnesses before said grand jury and testified concerning matters and things charged as alleged violations of law in and by said fifth count of said indictment, as shown by their verified pleas in abatement filed in this cause;

(c) that said United States Attorney has stated in open court that said Klaus was present and participated in the conduct of the proceedings of said grand jury which found and returned said fifth count of said indictment.

8. The alleged violations of law charged in said fifth count of said indictment are not violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 or 1938, or any of them.

9. The presence of said Crouter, said E. Riley Campbell and said Klaus in the grand jury room while the grand jury was convened and in session and investigating the alleged offenses set forth in said fifth count of said indictment and the participation or assistance of said persons, or any of them, in the conduct of the proceedings before said grand jury as aforesaid was, in view of the facts hereinabove alleged, improper, unfair to these defendants, and unlawful. Said fifth count of said indictment returned against these defendants was returned by a grand jury which could not lawfully find and return said fifth count of said indictment because said unauthorized persons were permitted to be present before said grand jury and participated and assisted in the conduct of the proceedings before said grand jury to the prejudice of these defendants.

10. These defendants were substantially and seriously prejudiced by the presence of said unauthorized persons before said grand jury and by their participation and as-

sistance in the proceedings before said grand jury as hereinabove alleged, for the reason that they unlawfully assisted and aided such investigations and persuaded said grand jury to find and return said fifth count of said indictment when they were without lawful authority so to do.

11. Defendants were thus deprived of their right to be charged with any alleged criminal acts in accordance with the traditional and orderly processes of law, and were thereby deprived of their constitutional rights to due process of law and to presentment and indictment in accordance with the rights guaranteed to defendants by the Fifth Amendment to the Constitution of the United States.

12. Defendants stand ready to verify the allegations contained in this plea in abatement, and also allege that further facts supporting and corroborating said allegations will, upon the trial of this plea in abatement, appear from the testimony of witnesses before said grand jury other than those defendants whose verified pleas in abatement have been filed herein and hereinabove referred to and from the minutes of said grand jury, but defendants say that they have been prevented and precluded from obtaining and alleging such additional and corroborative facts in support of this plea in abatement by reason of the

73 Court's denial of defendants' petition for release of the oaths of secrecy heretofore taken by the members of said grand jury and said witnesses, and by the Court's denial of leave to defendants to inspect those portions of the minutes of said grand jury bearing upon the matters alleged in this plea in abatement.

Wherefore, defendants pray that this, their second plea in abatement to the fifth count of said indictment be sustained, and that the aforesaid fifth count of said indictment returned against them in this cause be abated, set aside and quashed, and that they be permitted to go hence without a day as to all alleged violations of law charged in and by said fifth count of said indictment.

Kirkland, Fleming, Green, Martin & Ellis,
Attorneys for the above named defendants.

74 United States of America, }
State of Illinois, } ss.
County of Cook.

Moses L. Annenberg, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

Moses L. Annenberg,

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Zella M. Rose,
Notary Public.

(Seal)

75 United States of America, }
State of Illinois, } ss.
County of Cook.

Jules Taylor, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

Jules Taylor,

Subscribed and sworn to before me this 15th day of November, A. D. 1939.

Wayne F. Swonk,
Notary Public.

(Seal)

76 United States of America, }
State of Illinois, } ss.
County of Cook.

James M. Ragen, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

James M. Ragen,

Subscribed and sworn to before me this 13th day of November, A. D. 1939.

Zella M. Rose,
Notary Public.

(Seal)

77 United States of America, }
State of Illinois, } ss.
County of Cook.

James M. Ragen, Jr., being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

James M. Ragen, Jr.,

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Wayne F. Swonk,
Notary Public.

(Seal)

78 United States of America, }
State of Illinois, } ss.
County of Cook.

Herbert S. Kamin, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing plea in abatement in his behalf and knows the contents thereof, and that the same is true.

Herbert S. Kamin,

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Wayne F. Swonk,
Notary Public.

(Seal)

79 United States of America, }
State of Illinois, } ss.
County of Cook.

James M. Ragen, Jr., being first duly sworn, on oath deposes and says that he is Vice President of the Consensus Publishing Company, one of the defendants to the above numbered indictment; that he is authorized to verify this plea in abatement on behalf of said defendant; that he has read the foregoing plea in abatement in behalf of said defendant and knows the contents thereof, and that the same is true.

James M. Ragen, Jr.,

Subscribed and sworn to before me this 14th day of November, A. D. 1939.

Wayne F. Swonk,
Notary Public.

(Seal)

80

EXHIBIT "A."

I, Earl C. Crouter, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will sell and faithfully discharge the duties of the office

Special Assistant to the Attorney General, under authority of letter dated May 11, 1939 to assist in the investigation and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1929, 1934, 1936 and 1938 by Moses Louis Annenberg, The Ceceila Company and others in the Northern District of Illinois, with grand jury authority.

on which I am about to enter; So help me God.

(Sign here) Earl C. Crouter

Where born (State only) S. Dak.

Date of birth Aug. 14, 1903

Whence appointed: Wyo.

State Wyo. County Johnson

Congressional District At Large

Subscribed and sworn to before me this 17th day of May,
A. D. 1939.

William J. Campbell,

(Seal)

Notary Public.

Date of entry upon duty May 17, 1939

Residence 4221—43rd St. N. W., Washington, D. C.

Do you receive an annuity under the Civil Service Retirement Act? No.

(Filed Jun 1 1939 At _____ o'clock _____ Hoyt King Clerk)

81

EXHIBIT "B."

I, E. Riley Campbell, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office

Special Assistant to the United States Attorney for the Northern District of Illinois, under authority of letter dated May 11, 1939 to assist in the investigation and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 by Moses Louis Annenberg, The Cecelia Company and others in the Northern District of Illinois, with grand jury authority on which I am about to enter; So help be God.

(Sign here) E. Riley Campbell

Where born (State only) Mo.

Date of birth Dec. 24, 1899

Whence appointed: Chicago

State Illinois County Cook

Congressional District Tenth

Subscribed and sworn to before me this 17th day of May, A. D. 1939.

William J. Campbell

Notary Public.

(Seal)

Date of entry upon duty May 17, 1939

Residence Chicago, Illinois

Do you receive an annuity under the Civil Service Retirement Act? No

(Filed Jun 1 1939 At _____ o'clock Hoyt King Clerk)

82

EXHIBIT "C."

I, Samuel Klaus, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office

Special Assistant to the United States Attorney, under authority of of letter dated May 11, 1939 to assist in the investigation and prosecution of alleged violations of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 by Moses Louis Annenberg, The Cecelia Company and others in the Northern District of Illinois, with grand jury authority

on which I am about to enter; So help me God.

(Sign here) Samuel Klaus

Where born (State only) New York

Date of birth August 29, 1904

Whence appointed; Chicago

(Northern Ill.)

State N. Y. County Kings

Congressional District 6th N. Y.

Subscribed and sworn to before me this 17th day of May,
A. D. 1939.

William J. Campbell

(Seal)

Notary Public.

Date of entry upon duty May 17, 1939

Residence Brooklyn, N. Y.

Do you receive an annuity under the Civil Service Retirement Act? No

(Filed Jun 1 1939 At _____ o'clock _____ Hoyt King Clerk)

83 Endorsed: In the District Court of the United States • • (Caption—31760) • • Plea in Abatement No. 2 to the Fifth Count of said Indictment. Filed Nov. 15, 1939, Hoyt King Clerk.

Filed
Nov. 27,
1939.

151 And on, to wit, the 27th day of November A. D. 1939 came the United States of America by its attorneys and filed in the Clerk's office of said Court Motion to Strike Pleas in Abatement No. 1 and No. 2 in words and figures following, to wit:

152 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

• • (Caption—31760) • •

MOTION TO STRIKE PLEAS IN
ABATEMENT NO. 1.

Comes now the United States of America by William J. Campbell, United States Attorney for the Northern District of Illinois, and moves the Court to strike the Pleas in Abatement No. 1 filed herein by the defendants, Moses L. Annenberg, William Molasky, Jules Taylor, Arnold W. Kruse, James M. Ragen, Sr., James M. Ragen, Jr., Herbert S. Kamin, and the Consensus Publishing Company, to the above-numbered indictment, for that:

1. The Pleas, and each of them, do not state facts sufficient to constitute a plea in abatement;

2. The Pleas, and each of them, allege on knowledge facts which the Court will take judicial notice the defendants cannot know and fail to state the sources of information upon which the allegations are founded;

3. The Pleas, and each of them, do not state facts sufficient to establish that the defendants, or any of them, are prejudiced by the alleged errors;

4. The Pleas, and each of them, attempt to contradict the respective records applicable to the above-numbered indictment;

5. The Pleas, and each of them, are insufficient in law;

153 6. The Pleas, and each of them, are not well taken under the law as made and provided herein.

Sgd. William J. Campbell,
William J. Campbell,
United States Attorney.

November 27, 1939.

154 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

• • (Caption—31760) • •

MOTION TO STRIKE PLEAS IN ABATEMENT
NO. 2.

Comes now the United States of America by William J. Campbell, United States Attorney for the Northern District of Illinois, and moves the Court to strike the Pleas in Abatement No. 2 filed herein by the defendants, Moses L. Annenberg, William Molasky, Jules Taylor, Arnold W. Kruse, James M. Ragen, Sr., James M. Ragen, Jr., Herbert S. Kamin, and the Consensus Publishing Company, to the Fifth Count of the above-numbered indictment, for that:

1. The Pleas, and each of them, do not state facts sufficient to constitute a plea in abatement;

2. The Pleas, and each of them, allege on knowledge facts which the Court will take judicial notice the defendants cannot know and fail to state the sources of information upon which the allegations are founded;

3. The Pleas, and each of them, do not state facts sufficient to establish that the defendants, or any of them, are prejudiced by the alleged errors;

4. The Pleas, and each of them, attempt to contradict the respective records applicable to the above-numbered indictment;

5. The Pleas, and each of them, are insufficient in law;

155 6. The Pleas, and each of them, are not well taken under the law as made and provided herein.

Sgd William J. Campbell,

William J. Campbell,

United States Attorney.

November 27, 1939.

Entered
Nov 27,
1939.

156 And afterwards, to wit, on the 27th day of November, A. D. 1939, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

157 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Present: Honorable James H. Wilkerson, Judge.

Monday, November 27, A. D. 1939.

United States of America,

vs.

William Molasky, Arnold W.
Kruse, Lester A. Kruse, James
M. Ragen, James M. Ragen, Jr.,
and The Consensus Publishing
Company, an Illinois corpora-
tion.

No. 31760.

This day comes the United States Attorney and enters herein his motion to strike the defendants' pleas in abatement after arguments of counsel said motion is taken under advisement and the Government to file brief by November 29, 1939 and reply briefs to be filed by December 4th, A. D. 1939.

158 And afterwards, to wit, on the 11th day of December, A. D. 1939, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

159 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division.

Entered
Dec. 11,
1939.

| | | |
|----------------------------|---|-----------------|
| United States of America, | } | Indictment Nos. |
| <i>vs.</i> | | 31755 |
| Moses L. Annenberg, et al. | | 31760 |
| | | 31762 |
| | | 31767 |
| United States of America, | } | Indictment No. |
| <i>vs.</i> | | 31764 |
| James M. Ragen. | | |
| United States of America, | } | Indictment No. |
| <i>vs.</i> | | 31763 |
| Arnold W. Kruse. | | |

ORDER.

On motion of the United States of America by William J. Campbell, United States Attorney for the Northern District of Illinois, for leave to file in the above entitled causes certified copies of letters of authority from the Attorney General of the United States addressed and delivered to James V. Hayes, Sam Neel and George S. Robinson, respectively, in connection with certain grand jury proceedings referred to in certain of the defendants' pleas in abatement filed in said causes, and to make said letters a part of the Government's motions to strike said pleas in abatement,

It Is Hereby Ordered that leave be, and is hereby given to the United States Attorney to file said letters of authority in the above entitled causes for use by the Court in its consideration of the said motions to strike the said pleas in abatement and the said letters are hereby made a part of the said motions to strike.

Enter:

James H. Wilkerson,
*Judge of the District Court of the
United States for the Northern
District of Illinois.*

Dated at Chicago, Illinois, this 11th day of December,
A. D. 1939.

Filed
Dec. 11,
1939.

161 And on, to wit, the 11th day of December, A. D. 1939, was filed in the Clerk's office of said Court THREE CERTIFIED COPIES OF LETTERS in words and figures following, to wit:

162

DEPARTMENT OF JUSTICE

Washington, D. C.

May 26, 1939

Mr. George S. Robinson,
Antitrust Division,
Department of Justice.

Dear Mr. Robinson:

You are hereby appointed a Special Assistant to the Attorney General under the authority of the Department of Justice, to assist in the investigation and prosecution of alleged violations of Sec. 35 C.C. as amended (18 U.S.C. 80-86), Sec. 37 C.C. (18 U.S.C. 88); Sec. 39 C.C. (18 U.S.C. 91), Sec. 125 C.C. (18 U.S.C. 231), Sec. 126 C.C. (18 U.S.C. 232), Sec. 1114, Rev. Act, 1926 (26 U.S.C. 1693), Sec. 146, Rev. Act, 1928, and Sec. 145, Rev. Acts, 1932, 1934, 1936 and 1938 (26 U.S.C. 145), and Sec. 525, Rev. Act, 1932 (26 U.S.C. 574), by Moses Louis Annenberg, The Cecelia Company, its subsidiaries and affiliates, and other persons, firms and corporations as yet unknown, who may have participated in the alleged violations.

In that connection, you are specifically authorized and directed to conduct in the Northern District of Illinois, and in any other judicial district where the jurisdiction thereof lies, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys are authorized by law to conduct.

You are to serve without compensation other than that you are now receiving as a Special Assistant to the Attorney General in the Department of Justice, but you will be allowed your necessary expenses of travel, together with \$5.00 per diem in lieu of subsistence while absent from your official headquarters on official business under this appointment.

You should execute the required oath of office, and transmit a copy thereof to the Department.

Respectfully

Frank W. Murphy

Attorney General.

By the Attorney General:

(Sgd.) Matthew F. McGuire

Acting

The Assistant to the Attorney General.

163

DEPARTMENT OF JUSTICE

Washington, D. C.

May 18, 1939.

Mr. James V. Hayes,
Antitrust Division,
Department of Justice.

Dear Mr. Hayes:

You are hereby appointed a Special Assistant to the Attorney General under the authority of the Department of Justice, to assist in the investigation and prosecution of alleged violations of Sec. 35 C.C. as amended (18 U.S.C. 80-86), Sec. 37 C.C. (18 U.S.C. 88), Sec. 39 C.C. (18 U.S.C. 91), Sec. 125 C.C. (18 U.S.C. 231), Sec. 126 C.C. (18 U.S.C. 232), Sec. 1114, Rev. Act, 1926 (26 U.S.C. 1693), Sec. 146, Rev. Act, 1928, and Sec. 145, Rev. Acts, 1932, 1934, 1936 and 1938 (26 U.S.C. 145), and Sec. 525, Rev. Act, 1932 (26 U.S.C. 574), by Moses Louis Annenberg, The Cecelia Company, its subsidiaries and affiliates, and other persons, firms and corporations as yet unknown, who may have participated in the alleged violations.

In that connection, you are specifically authorized and directed to conduct in the Northern District of Illinois, and in any other judicial district where the jurisdiction thereof lies, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys are authorized by law to conduct.

You are to serve without compensation other than that you are now receiving as a Special Assistant to the Attorney General in the Department of Justice, but you will be allowed your necessary expenses of travel, to-

gether with \$5.00 per diem in lieu of subsistence while absent from your official headquarters on official business under this appointment.

You should execute the required oath of office, and transmit a copy thereof to the Department.

Respectfully,

Frank W. Murphy

Attorney General.

By the Attorney General:

(Sgd.) Matthew F. McGuire

Acting

The Assistant to the Attorney General.

May 18, 1939

Mr. Sam Neel
Antitrust Division
Department of Justice

Dear Mr. Neel:

You are hereby appointed a Special Assistant to the Attorney General under the authority of the Department of Justice, to assist in the investigation and prosecution of alleged violations of Sec. 35 C.C. as amended (18 U.S.C. 80-86), Sec. 37 C.C. (18 U.S.C. 88), Sec. 39 C.C. (18 U.S.C. 91), Sec. 125 C.C. (18 U.S.C. 231), Sec. 126 C.C. (18 U.S.C. 232), Sec. 1114, Rev. Act, 1926 (26 U.S.C. 1693), Sec. 146, Rev. Act, 1923, and Sec. 145, Rev. Acts, 1932, 1934, 1936 and 1938 (26 U.S.C. 145), and Sec. 525, Rev. Act, 1932 (26 U.S.C. 574), by Moses Louis Annenberg, The Cecelia Company, its subsidiaries and affiliates, and other persons, firms and corporations as yet unknown, who may have participated in the alleged violations.

In that connection, you are specifically authorized and directed to conduct in the Northern District of Illinois, and in any other judicial district where the jurisdiction thereof lies, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys are authorized by law to conduct.

You are to serve without compensation other than that you are now receiving as a Special Attorney in the

Department of Justice, but you will be allowed your necessary expenses of travel, together with \$5.00 per diem in lieu of subsistence while absent from your official headquarters on official business under this appointment.

You should execute the required oath of office, and transmit a copy thereof to the Department.

Respectfully,

Frank Murphy,

Attorney General.

By the Attorney General:

(Sgd.) Matthew F. McGuire

The Acting Assistant to the Attorney General.

165 And on, to wit, the 19th day of December, A. D. 1940, was filed in the Clerk's office of said Court certain Memorandum in words and figures following, to wit:

Filed
Dec. 19,
1939.

166 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Captions—31755, 60, 62, 66, 67, 63 & 64) * *

MEMORANDUM.

Wilkerson, District Judge:

The first type of plea in abatement attacks the presence of assistant prosecutors Hayes, Robinson and Neel before the grand jury which returned the indictments charging violation of the revenue acts. In the reply brief, defendants say that the question is not whether they had a certain kind of writing from the Attorney General; or whether they had any letters at all from him; or whether whatever letters they had were broad enough to cover the particular activities in which they engaged; or whether a person legally present at grand jury proceedings must participate while there. They assert that the question is a constitutional one as to whether persons who are and intend to be only observers may legally attend grand jury sessions; as to whether the fifth amendment requiring indictments by a grand jury is to be protected against possibility of governmental abuse if, wholly apart from the needs of the grand jury itself, the Government may send observers to watch its proceedings.

They contend that observers may not legally be present at grand jury proceedings no matter by whom they are sent and regardless of the guise by which they obtain admission.

It seems to be conceded that the three persons mentioned had letters from the Attorney General appointing and authorizing them to appear and assist in this grand jury investigation, and that they filed the required oaths. In fact, copies of the letters themselves which have been filed with the clerk contain the grand jury authorization. Defendants' contention is that the real purpose of these three assistants was to be present merely as observers and not as aiders or advisers of the grand jury, and that when they were so present they acted merely as observers.

The court instructed the grand jury when it was impaneled that it was an independent body not subject to the United States Attorney, but that it had the right to call upon him and his office for assistance and advice. It had the right to invite him or his assistants to appear before it or to keep him or them out of the grand jury room. If, in response to such invitation, express or implied, more assistants were present than ordinarily, it may first be parenthetically remarked that it does not appear that the grand jury knew what the ordinary practice was. In any event it was within the power of the grand jury under the instructions of the court to regulate the number of assistants present. The fact that the three attorneys were not articulate during the investigations does not necessarily mean that the grand jury had them present merely as observers. Attorneys may be present before a grand jury for the purpose of aiding it even though the occasion does not arise for them to say anything. It seems to me, if the Attorney General authorized them to appear to aid the grand jury, and the grand jury permitted or invited them to the grand jury proceedings, that the propriety of the attorneys' appearance for the purpose of aiding the grand jury is sufficiently established. A case may be conceived where a prosecuting attorney or his assistant may be present before the grand jury for the purpose of aiding it and giving advice as occasion may require and yet not be called upon so to do. Such fact would not invalidate an indictment returned by the grand jury.

There is no allegation that any of the three persons above mentioned said anything to the grand jurors or urged them to return an indictment. It is merely alleged that their presence impressed upon the grand jury the Government's desire for an indictment. It may well be presumed that the grand jury knew that the Government, when it presented the voluminous evidence and when it kept the grand jury at work during the summer months, was doing so with a view toward indictment. The grand jury in any case presented to it, is no doubt impressed with the thought that the Government wants an indictment. It may be that the volume of the evidence and the complexity of the case might have afforded ample justification to the jury for the presence of the three additional assistants. If, as alleged in the plea, the purpose of the presence of the three assistants was to obtain information to be used in separate antitrust investigations and proceedings, and the grand jury became aware of that purpose, their presence might have had the effect of making the jury proceed even more cautiously in returning indictments. It does not seem to me that the presence of the three attorneys had any effect or any substantial effect with the jury toward inducing it to return an indictment, and the plea in abatement, especially when it is read in the light of the rules applicable to such pleas, does not allege any facts from which it may be concluded that any prejudice resulted.

The second type of plea in abatement alleges that Messrs. Klaus, Crouter and Campbell were authorized to appear before the grand jury solely in connection with offenses arising under certain designated revenue acts, but that in spite of this limitation, they conducted proceedings before the grand jury relating to an alleged lottery offense and to several alleged conspiracies not arising under the revenue acts. Defendants contend
169 that a special assistant directed to investigate the violation of certain statutes (the revenue acts) may not participate in grand jury investigations of other offenses, and that, therefore, the participation of these three assistants requires that the indictments and counts for offenses other than revenue offenses be quashed.

These contentions are based upon Section 310 of Title 5 of the U. S. Code, which provides that an attorney specially appointed by the Attorney General may, when

thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, including grand jury proceedings.

A grand jury investigation may be chiefly directed toward violations of the revenue acts. In the course of the investigation it may incidentally become apparent that the conspiracy statute, or some other statute, has also been violated. A grand jury may even become convinced that a witness before it has perjured himself. It seems to me that in such circumstances an indictment returned by the grand jury based upon evidence before it, should not be held invalid even though the special designation of an attorney who has participated in the proceedings was directed only to the principal object of the investigation. This objection in my opinion should be classified as constituting at most one of the form only within Section 556, Title 18, of the U. S. Code.

The third type of plea is based upon Section 421, Title 28, U. S. Code, which permits extension of the term of a grand jury "solely to finish investigations begun but not finished by such grand jury." This plea alleges that the investigation of the lottery offenses charged by the indictment in cause No. 31766 did not begin in the June term but began during the July term. It is pointed out that the indictment alleges that the offenses did not occur until August, 1939, and that the persons who are charged with operating the lotteries did not appear before the grand jury at the June term but appeared at the extended term.

The grand jury at the June term commenced an investigation of the affairs of Annenberg and his associates.

The inquiry was not completed at the June term 170 and the grand jury was accordingly extended to the

July term. Annenberg's affairs had many ramifications and it could not definitely be ascertained until all the work had been done, what offenses, if any, had been established by the evidence. In my opinion the lottery indictments came within the scope of the investigation. Furthermore, even if the term of the grand jury was extended only to finish an investigation directed toward violations of the revenue laws, yet if during the extended term the jury incidentally became possessed of evidence showing violation of the lottery law, I am inclined to the opinion that it could validly return an indictment even

thought the offenses did not occur until after the term which was extended. Furthermore, the statute does not say that the investigation begun but not finished must be limited to the particular offense charged in the indictment which is subsequently returned. It is quite conceivable that an investigation might not at the original terms produce evidence sufficient to establish an offense, and that such evidence might not be obtained until the investigation had progressed beyond the original term.

The motions to strike the pleas in abatement should be sustained. Orders in accordance with this memorandum may be submitted on proper notice.

19 December, 1939.

171 Endorsed: * * (Captions—31755, 60, 62, 66, 67,
65 & 64) * * Memorandum Filed Dec 19 1939
Hoyt King, Clerk.

234 And afterwards, to wit, on the 21st day of December, A. D. 1939, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appear the following entries, to wit:

Entered
Dec. 21,
1939.

235 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

United States of America

vs.

Moses L. Annenberg, *et al.*

} D. C. No. 31760.

ORDER.

This matter having come on to be heard upon Pleas in Abatement No. 1 filed by the defendants in the above entitled cause and upon Pleas in Abatement No. 2 filed by the said defendants to the Fifth Count of the Indictment herein, and upon the Government's Motions to Strike said

Order.

Pleas in Abatement No. 1 and said Pleas in Abatement No. 2, and the Court having read and fully considered said Pleas in Abatement and the Government's Motions to Strike the same and the letters of authority of Hayes, Robinson and Neel, Special Assistants to the Attorney General, which by order of this Court were made a part of said Motions to Strike, and the briefs filed in support of and in opposition to said Motions to Strike the said Pleas in Abatement, and having heard the arguments of counsel and being fully advised in the premises,

It Is Hereby Ordered that the said Motions To Strike the Pleas in Abatement No. 1 and Pleas in Abatement No. 2 filed herein be, and the same are, hereby sustained, and the said Pleas in Abatement No. 1 and Pleas in Abatement No. 2 and each of them, are hereby stricken.

Enter:

James H. Wilkerson,
*Judge of the United States District Court
for the Northern District of Illinois.*

Dated at Chicago, Illinois,
December 21, 1939.

236 To which order, and each portion thereof, the defendants and each of them in the above numbered indictment except. Said defendants are hereby allowed sixty days for the filing of a bill of exceptions.

Enter:

James H. Wilkerson,
*Judge of the United States District Court
for the Northern District of Illinois.*

Entered 237 IN THE DISTRICT COURT OF THE UNITED STATES.
Dec. 21. • • (Caption—31760) • •
1939.

Thursday, December 21, A. D. 1939.

Present: Honorable James H. Wilkerson, Judge.

On motion of defendants' attorneys it is ordered that leave be and the same is hereby given the defendants to file pleas in bar by January 10, A. D. 1940.

306 And on, to wit, the 14th day of February, A. D. 1940, Filed
Feb. 14,
1940.
came the defendants by their attorneys and filed in
the Clerk's office of said Court certain Bill of Exceptions
in words and figures following, to wit:

307 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

In Re Pleas in Abatement.

BILL OF EXCEPTIONS.

Be it remembered that hereinbefore, to-wit, on the 15th day of November, A. D. 1939, the defendants and each of them to the above numbered indictment, by their respective attorneys, filed herein their verified pleas in abatement No. 1 praying for an order that the indictment and each and every count thereof returned against them in this cause be abated, set aside and quashed, and that they be permitted to go hence without day, said pleas being as follows:

Said Plea in Abatement Number 1 of James M. Ragen and James M. Ragen, Jr., appears on pages 96-103 of the Printed Record.

Said Plea in Abatement Number 1 of Arnold W. Kruse and Lester A. Kruse appear on pages 81-87 of the Printed Record.

Said Plea in Abatement Number 1 of William Molasky appear on pages 68-74 of the Printed Record.

340 Be it further remembered that hereinbefore, to-wit, on the 15th day of November, 1939, the defendants and each of them, to the fifth count of the above numbered indictment, by their respective attorneys, filed herein their verified pleas in abatement No. 2 praying for an order that the fifth count of the indictment be abated, set aside and quashed, and that they be permitted to go hence without day, said pleas being as follows:

Said Plea in Abatement Number 2 of James M. Ragen and James M. Ragen, Jr., filed November 15, 1939 appears on pages 104-113 of the Printed Record.

Said Pleas in Abatement No. 2 of Arnold W. Kruse and Lester A. Kruse appear on pages 87-96 of the Printed Record.

Said Plea in Abatement No. 2 of William Molasky appears on pages 74-81 of the Printed Record.

382 Be it further remembered that heretofore, to-wit, on the 27th day of November, A. D. 1939, the United States of America, by William J. Campbell, U. S. Attorney for the Northern District of Illinois, filed herein its motion to strike pleas in abatement No. 1 as follows:

Said motion of the United States appears on pages 114-115 of the Printed Record.

388 Be it further remembered that heretofore, to-wit, on the 11th day of December, 1939, the United States of America, by William J. Campbell, U. S. Attorney for the Northern District of Illinois, filed a notice and presented a motion for leave to file certified copies of certain letters of authority, said notice being as follows:

389

AM-HMA.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois,

Eastern Division.

| | | |
|-----------------------------------|---|-----------------|
| United States of America | } | Indictment Nos. |
| <i>vs.</i> | | 31755, |
| Moses L. Annenberg, <i>et al.</i> | | 31760, |
| | | 31762, |
| | | 31767. |

| | | |
|--------------------------|---|----------------|
| United States of America | } | Indictment No. |
| <i>vs.</i> | | 31764. |
| James M. Rager. | | |

| | | |
|--------------------------|---|----------------|
| United States of America | } | Indictment No. |
| <i>vs.</i> | | 31763. |
| Arnold W. Kruse. | | |

NOTICE.

To: Kirkland, Fleming, Green, Martin & Ellis,
Room 3200, 33 North LaSalle Street,
Chicago, Illinois.

Miller, Gorham, Wescott & Adams,
Room 3500, 1 North LaSalle Street,
Chicago, Illinois.

Taylor, Miller, Busch & Boyden,
134 South LaSalle Street,
Chicago, Illinois.

Charles F. Rathbun,
Room 1303, 69 West Washington Street,
Chicago, Illinois.

Henry J. and Charles Aaron,
33 South Clark Street,
Chicago, Illinois.

David Baron,
c/o Kirkland, Fleming, Green, Martin & Ellis,
Room 3200, 33 North LaSalle Street,
Chicago, Illinois.

390 Please Take Notice that on Monday, the 11th day
of December, 1939, at the hour of ten o'clock a. m.,

or as soon thereafter as counsel can be heard, I shall appear before the Honorable James H. Wilkerson, Judge of the District Court of the United States for the Northern District of Illinois, in Room 627 United States Court House, Chicago, Illinois, and shall then and there present the Government's motion for leave to file in the above entitled causes certified copies of letters of authority from the Attorney General of the United States addressed and delivered to James V. Hayes, Sam Neel and George S. Robinson in connection with the grand jury investigation referred to in certain pleas in abatement filed by the defendants in said causes, and I shall further move the Court for an order making said letters of authority a part of the Government's respective motions to strike said pleas in abatement heretofore filed in said causes to be considered by the Court in its rulings on said motions to strike; at which time and place you may appear if you see fit.

William J. Campbell,
United States Attorney.

Received a true copy of the above and foregoing notice this 9th day of December, A. D. 1939.

Taylor, Miller, Busch & Boyden,
Miller, Gorham, Wescott & Adams,
Kirkland, Fleming, Green, Martin & Ellis,
David Baron,
Charles F. Rathbun,
Henry J. & Charles Aaron.

391 Be it further remembered that the aforesaid notice and motion came on to be heard before the Honorable James H. Wilkerson, one of the judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division, and thereafter the said Judge of said Court, on, to-wit, the 11th day of December, 1939, in ruling upon said motion, entered the following order:

Said order appears on page 117 of the Printed Record.

394 Be it further remembered that heretofore to-wit, on the 11th day of December, 1939, the United States of America, by William J. Campbell, U. S. Attorney for the Northern District of Illinois, filed herein certain letters of authority as follows:

Said letters of authority appear on pages 118-121 of the printed Record.

401 Be it remembered that the aforesaid pleas in abatement and each of them came on to be heard before the Honorable James H. Wilkerson, one of the judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, and thereafter the said Judge of said Court on, to-wit, the 19th day of December, 1939, in ruling upon said pleas in abatement, rendered the following memorandum decision upon the aforesaid pleas in abatement and each of them:

Said Memorandum of the Court appears on pages 121-125 of the Printed Record.

408 And the Court on, to-wit, the 21st day of December, A. D. 1939, entered the following order sustaining the motion to strike said pleas in abatement:

Said order appears on pages 125-126 of the Printed Record.

412 To which ruling, decision, and order of the court striking the aforesaid pleas in abatement, and each of them, the defendants, by their attorneys, then and there severally excepted.

Forasmuch as the matters set forth do not fully appear of record, the defendants, and each of them, by their respective attorneys, tender this bill of exceptions and pray that the same may be signed, sealed, settled, and allowed pursuant to the provisions therefor contained in the foregoing order. The undersigned, being a judge of the court in which such matters were heard and now holding such court, and who is hearing all matters theretofore assigned to James H. Wilkerson, finds and certifies that James H. Wilkerson, the Judge of the District Court for the Northern District of Illinois who heard the matters hereinbefore set forth and entered the foregoing order, is, by reason of his sickness, unable to allow and sign this

132 *Order Approving Bill of Exceptions, Etc.*

bill of exceptions, and further finds and certifies that said James H. Wilkerson is absent from the district. This bill of exceptions is accordingly in open court signed, sealed, settled, and allowed by the court this 14th day of February, 1940.

Igoe, (Seal)
*District Judge of the United States for
the Northern District of Illinois.*

Approved:

William J. Campbell,
United States Attorney.

413 Endorsed: In the U. S. District Court. • • (Caption—31760) • • Bill of Exceptions. Filed Feb. 14, 1940. Hoyt King, Clerk.

Entered
Feb. 14,
1940.

414 And afterwards, to wit, on the 14th day of February, A. D. 1940, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

415 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division.

Wednesday, February 14, A. D. 1940.

Present: Honorable Michael L. Igoe, Judge.

| | | |
|-----------------------------------|---|------------|
| United States of America | } | No. 31760. |
| <i>vs.</i> | | |
| Moses L. Annenberg, <i>et al.</i> | | |

This day come the defendants by their attorneys and present herein their bill of exceptions, which bill of exceptions is approved and signed by the Court and ordered by the Court to be filed by the Clerk of this Court.

238 And on, to wit, the 10th day of January, A. D. 1940, Filed
Jan. 10,
1940.
came the defendant by his attorneys and filed in the
Clerk's office of said Court a certain Special Plea in Bar
(Immunity Plea) in words and figures following, to wit:

239 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—31760) • •

**SPECIAL PLEA IN BAR OF DEFENDANT
WILLIAM MOLASKY (IMMUNITY PLEA).**

Now comes William Molasky, one of the defendants to the above numbered indictment, by his attorneys, and presents this his special plea in bar to said indictment No. 31760, returned herein on the 22nd day of August, 1939, and to each and every count thereof, and says that the United States of America ought not to prosecute further the aforesaid indictment nor any count thereof against this defendant, and prays the court to dismiss said indictment and each and every count thereof, as to this defendant, and to discharge this defendant, for the reason that this defendant has received immunity from prosecution and from being subjected to any penalty or forfeiture for or on account of the transactions, matters, and things charged against him in said indictment and each and every count thereof, pursuant to the Constitution and laws of the United States, including the provisions of Sections 32 and 33 of Title 15 of the United States Code, all as hereinafter more fully set forth in this special plea in bar:

240 1. This indictment No. 31760 was returned on the 22nd day of August, 1939 by the grand jury for the June term, 1939 extended for the July term, 1939.

2. On or about July 6, 1939, there was impaneled another grand jury for the Northern District of Illinois, Eastern Division, being the grand jury for the July term, 1939, which said second grand jury conducted investigations during a period which was contemporaneous with the extended term of the aforesaid grand jury for the June term, 1939.

3. Said grand jury for the July term, 1939, conducted an investigation of alleged violations of the Anti-Trust Laws of the United States on the part of some of the persons who are parties defendant to this indictment and

on the part of persons associated with said parties defendant, as more fully shown by the presentment returned in this court by said grand jury on to-wit, the 23rd day of August, 1939, reference thereto being had.

4. The Fifth Amendment to the Constitution of the United States reads in part as follows:

"No person shall . . . be compelled in any Criminal Case to be a witness against himself, . . ."

5. For the purpose of compelling the testimony of witnesses and the production of evidence in any proceeding, suit or prosecution under the Anti-Trust Laws of the United States, Congress has enacted Section 32 of Title 15 of the United States Code, which provides:

241 "Sec. 32. Immunity of witness. No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1 to 27, inclusive, of this chapter: Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

6. On or about July 12, 1939, this defendant was served with a subpoena duces tecum, requiring him to appear before said grand jury for the July term, 1939 and testify in behalf of the United States and also requiring him to produce before said grand jury on behalf of the United States the following documents and records, together with other documents and records therein described:

(1) All records of collections and disbursements of the Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(2) All records of the quantity of racing forms published and distributed by the Consensus Publishing Company from January 1, 1927 to December 31, 1938;

(3) All contracts between William Molasky and the Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(4) All cancelled checks issued by William Molasky on his personal bank accounts payable to, or endorsed by, the following individuals or corporations; M. L. Annenberg, Cecelia Investment Company, The Cecelia Company, the Consensus Publishing Company, Arnold W. Kruse, Joseph E. Hafner, Clarence L. Owen, Paul B.

Brown, Hal Langan and Joseph Ottenstein, during the period January 1, 1927 to December 31, 1938;

(5) All cancelled checks issued by the said William 242 Molasky payable to or endorsed by the following persons: Sam Fuer, Jack Meyer, Charles Lewis, B. McQuillian and Mr. Jacobs;

(6) All Minute Books containing notes of meetings of stockholders and Boards of Directors of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(7) All stock certificate records containing the stubs of all stock certificates issued, and all cancelled certificates of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and the Consensus Publishing Company.

A copy of said subpoena duces tecum so served upon this defendant is attached to this special plea in bar, marked Exhibit A, and by this reference made a part hereof. Said grand jury for the July term 1939 was then and there conducting the investigation hereinabove referred to concerning transactions, matters and things claimed to be in violation of the Anti-Trust Laws of the United States, and said subpoena was issued and served upon this defendant in connection with and in aid of said investigation.

7. James V. Hayes, George S. Robinson and Sam E. Neel, special assistants to the Attorney General of the United States, were the attorneys for the United States in charge of conducting said anti-trust investigation then being conducted by and before said grand jury for the July term 1939. Said Hayes, Robinson and Neel were present before the grand jury for the June term 1939, during a substantial part of the proceedings before said grand jury, and while the investigation resulting in the return of the indictment in this cause was in progress and while witnesses called in said investigation were present and 243 were testifying under oath before said grand jury.

(8) Thereafter, pursuant to and in accordance with said subpoena, but solely by reason of the compulsion and threat thereof and for no other reason whatsoever, this defendant on to-wit, the 24th, 25th, 26th, 27th and 28th days of July, 1939, appeared before said grand jury for the July term 1939, and after this defendant had been sworn and had testified concerning his name and address, stated that he had been advised by his attorney that he had a Constitutional privilege against testifying to anything

before said Grand Jury that might tend to incriminate him personally; that he had been connected for many years with the Annenberg organization and therefore more or less actively engaged in the business then being investigated; that he wanted it specifically understood that he was asserting his Constitutional privilege against self-incrimination, and refused to answer all questions unless granted immunity from prosecution that he also wanted it understood that as to each and every question put to him that might tend to incriminate him personally, he would not have to object specifically and his claim of immunity was to apply to all matters about which he might be required to testify before said Grand Jury. Whereupon James V. Haycs stated to this defendant, in substance, in the presence of said grand jury, and to the said grand jury that the attorneys for the United States had decided to grant immunity to this defendant and that this defendant was thereby granted immunity on all matters and questions put to him by or before said grand jury and that such immunity would apply to any and all matters, transactions, and things as to which he might testify.

(9) Having been advised by his counsel that by 244 virtue of the aforesaid section of the Anti-Trust laws relating to immunity he was, upon being granted immunity, required by law to testify and to produce evidence, documentary or otherwise, this defendant, on to-wit, the 24th, 25th, 26th, 27th and 28th days of July, 1939, testified at length as a witness on behalf of the United States before said grand jury for the July term, 1939, answered each and every question put to him by or before said grand jury and produced and delivered into the custody of said grand jury for the July term 1939, nine employment contracts between this defendant and the Consensus Publishing Company dated January 2, 1930, January 2, 1931, January 2, 1932, January 2, 1933, January 2, 1934, January 2, 1935, January 2, 1936, January 2, 1937 and January 2, 1938, respectively; all canceled checks issued by this defendant on his personal bank accounts from January 1, 1933, to January 1, 1939, among which were those payable to or endorsed by the following individuals or corporations: M. L. Annenberg, Cecelia Investment Company, The Cecelia Company, The Consensus Publishing Company, Arnold W. Kruse, Joseph E. Hafner, Clarence L. Owen, Paul B. Brown; letters written by this defendant to the Consensus Publishing Company inquiring as to the amount

received by this defendant from the Consensus Publishing Company during each of several years, including the years 1933 to 1938, and various other miscellaneous documents and records.

(10) In obedience to the command of said subpoena and pursuant to the immunity granted to this defendant, as aforesaid, defendant was required to testify before said grand jury for the July term 1939; and in response to questions put to him before said grand jury, this defendant gave oral testimony before said grand jury concerning the following transactions, matters and things, among others:

245 (a) The facts and transactions leading up to the organization and incorporation of the defendant Consensus Publishing Company.

(b) The transactions with reference to the capital stock of the defendant Consensus Publishing Company and the ownership of same from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive.

(c) The agreements and employment contracts with reference to commissions and salaries to be paid by Consensus Publishing Company to this defendant, William Molasky, and to Arnold W. Kruse, Lester A. Kruse, Bee Hoffman, James M. Ragen and James M. Ragen, Jr. from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive and the payments of commissions and salaries by the Consensus Publishing Company to the said individuals during said period of time, and the duties performed by each of said individuals for and in behalf of said defendant Consensus Publishing Company during said time.

(d) The expenses of the defendant Consensus Publishing Company including all commissions paid, from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive.

(e) The dividends paid by the defendant Consensus Publishing Company from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive.

(f) The tax returns made by the defendant Consensus Publishing Company from the time of its incorporation to

the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive.

11. In the course of his examination before said grand jury for the July term 1939, particularly with reference to the items enumerated in paragraphs 9 and 10 above, this defendant was compelled to give answers and to produce evidence, documentary or otherwise, relating to and tending to connect him with the allegations of this indictment, and thereby disclosed to said grand jury and the attorneys for the United States information material and relevant to the transactions, matters and things alleged against him in this indictment and each and every count thereof; and to the extent that this defendant may have committed any crime or crimes against the United States as charged in this indictment, or any count thereof, this defendant has, by his testimony thus compelled and given before said grand jury for the July term, 1939, as aforesaid, and by the 246 contracts, correspondence, reports, memoranda, cancelled checks and other communications produced by him before said grand jury pursuant to said subpoena as aforesaid, disclosed facts which tend to prove material allegations of said indictment, and each and every count thereof, and which would be links in a chain of evidence to establish the guilt of this defendant thereunder and to incriminate this defendant.

And this defendant avers and submits that under and by virtue of the Constitution and laws of the United States and because of the premises aforesaid, he cannot be prosecuted or subjected to any penalty or forfeiture for or on account of the transactions, matters, and things, or any or either of them, which are in this indictment and each and every count thereof mentioned and charged against this defendant, and all of this said defendant is ready to verify.

Wherefore, defendant, William Molasky, prays judgment that this said indictment against him and each and every count thereof be dismissed and set aside as to him and that he be discharged to go hence without day.

David Baron,

Attorney for defendant, William Molasky.

United States of America, }
 State of Missouri, } ss.
 City of St. Louis.

William Molasky, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing special plea in bar in his behalf and knows the contents thereof and that the same is true.

William Molasky,

Subscribed and sworn to before me this 4th day of January, A. D. 1940.

My term expires September 17, 1943.

Robt. A. Roessel,
Notary Public.

(Seal)

247 Subpoena Duces Tecum

DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

July Term, 1939.

The President of the United States of America.

To William Molasky,
 1401 Mart Building,
 12th and Spruce Streets,
 St. Louis, Missouri,

You Are Hereby Commanded that laying aside all and singular your business and excuses you be and appear before the Grand Jury of the District Court of the United States for the Northern District of Illinois, in the Federal Building, Room 450, in the City of Chicago, in said District on the 17th day of July, A. D. 1939, at ten o'clock A. M. of said day, and to bring and produce at the time and place aforesaid, the following records in his possession or control:

(1) All records of collections and disbursements of the Consensus Publishing Company during the period January 1, 1937 to December 31, 1938;

(2) All records of the quantity of racing forms published and distributed by the Consensus Publishing Company from January 1, 1927 to December 31, 1938;

(3) All contracts between William Molasky and the Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(4) All contracts between William Molasky and the following: Pioneer News Service, Inc., The Molasky Company, The Molasky Holding Company, Paul Brown, Clarence L. Owen, Daily Racing Form Publishing Company, R. D. Publishing Company, Louisiana News Company, Inc., Kansas City News Distributors, Inc.;

(5) All records of collections and disbursements during the period of January 1, 1927 to December 31, 1938, of the Pioneer News Service, Inc., including copies of weekly reports of income and disbursements, and all cancelled checks issued by the Pioneer News Service, Inc., on a bank account maintained under the name of Central News Service Company;

248 (6) All cancelled checks issued by William Molasky on his personal bank accounts payable to, or endorsed by, the following individuals or corporations: M. L. Annenberg, Cecelia Investment Company, The Cecelia Company, the Consensus Publishing Company, Arnold W. Kruse, Joseph E. Hafner, Clarence L. Owen, Paul B. Brown, Hal Langan and Joseph Ottenstein, during the period January 1, 1927 to December 31, 1938;

(7) All cancelled checks issued by the said William Molasky payable to or endorsed by the following persons: Sam Fuer, Jack Meyer, Charles Lewis, B. McQuillian and Mr. Jacobs;

(8) All Minute Books containing notes of meetings of stockholders and Boards of Directors of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(9) All stock certificate records containing the stubs of all stock certificates issued, and all cancelled certificates of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and the Consensus Publishing Company, on behalf of the United States, and not depart the Court without leave thereof or of the District Attorney.

Hereof Fail Not under penalty of what may befall you thereon.

To the Marshal of the Eastern District of Missouri to execute and return in due form of law.

Witness, the Honorable James H. Wilkerson District Judges of the United States, this 11th day of July A. D.

1939, and in the 164th year of the Independence of the United States of America.

Hoyt King,
Clerk.

(Seal)

A true copy teste
Hoyt King,
Clerk.

July 11th 1939.

249 Endorsed: In the District Court of the United States. * * (Caption—31760) * * Special Plea In Bar of Defendant William Molasky (Immunity Plea). Filed Jan. 10, 1940, Hoyt King, Clerk.

250 And on, to wit, the 10th day of January, A. D. 1940, came James M. Ragen, Jr., by his attorneys and filed in the Clerk's office of said Court certain Special Plea in Bar in words and figures following, to wit:

Filed
Jan. 10,
1940.

251 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—31760) * *

**SPECIAL PLEA IN BAR OF DEFENDANT JAMES
M. RAGEN, JR.**

(Immunity Plea.)

Now comes James M. Ragen, Jr., one of the defendants to the above numbered indictment, by his attorneys, and presents this his special plea in bar to said indictment No. 31760, returned herein on the 30th day of August, 1939, and to each and every count thereof, and says that the United States of America ought not to execute further the aforesaid indictment nor any count thereof against this defendant, and prays the court to dismiss said indictment and each and every count thereof, as to this defendant, and to discharge this defendant, for the reason that this defendant has received immunity from prosecution and from being subjected to any penalty or forfeiture for or on account of the transactions, matters, and things charged against him in said indictment and each and every count thereof, pursuant to the Constitution and laws of the United States, including the provisions of Section 32

of Title 15 of the United States Code, all as herein-
252 after more fully set forth in this special plea in bar;

1. This indictment No. 31760 was returned on the 22nd day of August, 1939, by the grand jury for the June Term 1939, extended for the July Term 1939.

2. On or about July 6, 1939, there was impaneled another grand jury for the Northern District of Illinois, Eastern Division, being the grand jury for the July Term 1939, which said second grand jury conducted investigations during a period which was contemporaneous with the extended term of the foresaid grand jury for the June Term 1939.

3. Said grand jury for the July Term 1939 conducted an investigation of alleged violations of the Anti-Trust Laws of the United States on the part of some of the persons who are parties defendant to this indictment and on the part of persons associated with said parties defendant, as more fully shown by the presentment returned in this court by said grand jury on to-wit, the 23rd day of August, 1939, reference thereto being had.

4. The Fifth Amendment to the Constitution of the United States reads in part as follows:

"No person shall . . . be compelled in any criminal case to be a witness against himself, . . ."

5. For the purpose of compelling the testimony of witnesses and the production of evidence in any proceeding, suit or prosecution under the Anti-Trust Laws of the United States, Congress has enacted Section 32 of Title 15 of the United States Code, which provides:

"Section 32. Immunity of witness. No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing 253 concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1 to 27, inclusive of this chapter: Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

6. On or about August 15, 1939, this defendant was served with a subpoena, requiring him to appear before said grand jury for the July Term 1939 and testify in behalf of the United States. A copy of said subpoena so served upon this defendant is attached to this special plea in bar, marked Exhibit A, and by this reference made a

part hereof. Said grand jury for the July Term 1939 was then and there conducting the investigation hereinabove referred to concerning transactions, matters and things claimed to be in violation of the Anti-Trust Laws of the United States, and said subpoena was issued and served upon this defendant in connection and in aid of such investigation.

7. James V. Hayes, George S. Robinson and Sam E. Neel, special assistants to the Attorney General of the United States, were the attorneys for the United States in charge of conducting said anti-trust investigation then being conducted by and before said grand jury for the July Term 1939. Said Hayes, Robinson and Neel were present before the grand jury for the June Term 1939 during a substantial part of the proceedings before said grand jury, and while the investigation resulting in the return of the indictment in this cause was in progress and while witnesses called in said investigation were present and were testifying under oath before said grand jury.

8. Thereafter, pursuant to and in accordance with 254 said subpoena but solely by reason of the compulsion and threat thereof and for no other reason whatsoever, this defendant on a certain date, to-wit, the 17th day of August, 1939, appeared before said grand jury for the July Term 1939, and, after being sworn and testifying concerning his name and address, this defendant read a statement to the grand jury asserting his constitutional privilege against self-incrimination. Said James V. Hayes then states to this defendant in substance in the presence of said grand jury that the attorneys for the United States had decided to grant immunity to this defendant and that this defendant was thereby granted immunity on all matters and questions put to him by or before said grand jury and that such immunity would apply to any and all matters, transactions, and things as to which he might testify.

9. Having been advised by his counsel that by virtue of the aforesaid sections of the Anti-Trust Laws relating to immunity he was, upon being granted immunity, required by law to testify, this defendant, on a certain date, to-wit, August 17, 1939, testified at length as a witness on behalf of the United States before said grand jury for the July Term 1939, and answered each and every question put to him by or before said grand jury.

10. In obedience to the command of said subpoena as aforesaid and pursuant to the immunity granted to this defendant as aforesaid, defendant was required to testify before said grand jury for the July Term 1939; and, in response to questions put to him before said grand jury, this defendant gave oral testimony before said grand jury describing his relations and connection with the Consensus Publishing Company, Moses L. Annenberg, William 255 Molasky, and James M. Ragen; and, in response to said questions, defendant testified fully and completely and stated all the facts within his knowledge concerning, among other things, said Consensus Publishing Company and this defendant's connection therewith and salaries and commissions received by him from, and services performed by him for, said company.

11. In the course of his said examination before said grand jury for the July Term 1939, particularly with reference to the items specifically enumerated in paragraph 10, this defendant was compelled to give answers relating to and tending to connect him with the allegations of this indictment, and thereby disclosed to said grand jury and the attorneys for the United States information material and relevant to the transactions, matters and things alleged against him in this indictment and each and every count thereof, and to the extent that this defendant may have committed any crime or crimes against the United States as charged in this indictment, or any count thereof, this defendant has, by his testimony thus compelled and given before said grand jury for the July Term 1939, pursuant to said subpoena as aforesaid, disclosed facts which tend to prove material allegations of said indictment, and each and every count thereof, and which would be links in a chain of evidence to establish the guilt of this defendant thereunder and to incriminate this defendant.

And this defendant avers and submits that under and by virtue of the Constitution and laws of the United States and because of the premises aforesaid, he cannot be prosecuted or subjected to any penalty or forfeiture for or on account of the transactions, matters, and 256 things, or any or either of them, which are in this indictment and each and every count thereof mentioned and charged against this defendant, and all of this said defendant is ready to verify.

Wherefore, defendant, James M. Ragen, Jr., prays judgment that this said indictment against him and each and every count thereof be dismissed and set aside as to him and that he be discharged and go hence without day.

Kirkland, Fleming, Green, Martin & Ellis,

*Attorneys for defendant,
James M. Ragen, Jr.*

Weymouth Kirkland,
Jay Fred Reeve,
Hammond E. Chaffetz.

257 United States of America, }
State of Illinois, } ss.
County of Cook.

James M. Ragen, Jr., being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing special plea in bar in his behalf and knows the contents thereof and that the same is true.

(Sgd) James M. Ragen, Jr.

Subscribed and sworn to before me this 9th day of January, A. D. 1940.

(Sgd) Florence Sorem,
Notary Public.

(Seal)

258

EXHIBIT A.

DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

The President of the United States of America

To the Marshall of the Northern District of Illinois,
Greeting:

We Command You to Summon
James M. Ragen, Jr.,
Chicago, Illinois

if found in your District to be and appear before our
Grand Jury of the District Court of the United States for

the Northern District of Illinois, Eastern Division, at Chicago, in the District aforesaid, on the 17th day of August, A. D. 1939, at 10:00 o'clock A. M., to testify in behalf of the United States generally, and not depart without leave of the Court or District Attorney. And this you shall in no wise omit under the penalty of the law in that case made and provided. And you have then and there this return.

Witness: The Hon. James H. Wilkerson, Judge of said Court, at Chicago, in said District, this 15th day of August, in the year of our Lord 1939 and of the Independence of the United States of America the 164th year.

Hoyt King,
Clerk.

Filed
Jan. 15,
1940.

259 And on, to wit, the 15th day of January, A. D. 1940, came the United States by its attorneys and filed in the Clerk's office of said Court Motion to Dismiss Special Plea in Bar of Defendant William Molasky (Immunity Plea) in words and figures following, to wit:

260 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

* * (Caption—31760) * *

MOTION TO DISMISS SPECIAL PLEA IN BAR OF DEFENDANT WILLIAM MOLASKY.

(IMMUNITY PLEA.)

Now comes the United States of America by its attorney, William J. Campbell, United States Attorney for the Northern District of Illinois, and moves this Court to dismiss the Special Plea in Bar filed herein by William Molasky, one of the defendants in the above numbered indictment, and shows the following in support of its said Motion:

I.

The prosecution herein exclusively relates to, and is based upon, willful attempts to evade and defeat income taxes due and owing from the Consensus Publishing Company, an Illinois Corporation, to the United States of

America, for the calendar years 1933 to 1936, both inclusive, pursuant to the Revenue Laws of the United States. The above numbered indictment was duly returned by the Grand Jury for the Northern District of Illinois, Eastern Division, for the June Term 1939 extended for the July Term 1939, and the said indictment charges violations of Section 88, Title 18, United States Code, and Section 145 of Title 26, United States Code. The proceedings and investigations resulting in the return of the said indictment were, and remain, under the direction of the duly appointed and acting United States Attorney for this district.

The proceedings and investigations conducted by the Grand Jury for the July Term 1939, set out in the Special Plea in Bar filed herein by the defendant William Molasky, and constituting the basis for the claim of immunity of the said defendant Molasky, were entirely distinct and independent proceedings from the proceedings before the said June Grand Jury, extended as aforesaid, and set out above, and, as appears from the defendant's Special Plea in Bar, the defendant Molasky knew that these proceedings before the said July Grand Jury were conducted by and under the supervision of certain Special Assistants to the Attorney General, namely, James V. Hayes, George S. Robinson, and Sam E. Neel, and were concerned solely with possible violations of the Act of Congress approved July 2, 1890, as amended, commonly known as the Sherman Anti-Trust Law. The proceedings of the said July Grand Jury in no wise whatsoever related to or concerned violations of the Revenue Laws of the United States, or conspiracies based upon such violations, or aiding, abetting, counselling, or assisting in such violations, all of which the defendant Molasky knew, as he admits in his Special Plea in Bar.

II.

The statute set forth in the Special Plea in Bar filed herein (Sec. 32, Title 15, U. S. Code) does not provide for immunity from prosecution for the offenses charged in the indictment, but relates solely to offenses and prosecutions arising under the said Anti-Trust Laws.

262

III.

The alleged testimony of the defendant Molasky before the said July Grand Jury and the documents which he allegedly produced pursuant to the subpoena of the said July Grand Jury were not, in fact, known to the officers appearing on behalf of the United States in the proceedings and investigations before the said June Grand Jury, nor was any of the testimony allegedly given by the said defendant or the documents allegedly produced by him before the said July Grand Jury made use of in any way in the proceedings before the said June Grand Jury, all of which appears from the affidavit of William J. Campbell, United States Attorney for the Northern District of Illinois, attached hereto as Exhibit "A"; nor does the Special Plea in Bar filed by the said defendant Molasky allege or show that the testimony allegedly given and documents allegedly produced by him before the said July Grand Jury were known to or used by the said June Grand Jury, or in any way served as a basis for the prosecution herein.

IV.

The Special Plea in Bar filed by the defendant Molasky does not allege or show that this is a prosecution for or on account of any transaction, matter, or thing concerning which he testified or produced evidence, documentary or otherwise, before the said July Grand Jury.

V.

No testimony which the defendant Molasky gave before the said July Grand Jury or documents which he produced before the said July Grand Jury, which are referred to in the said Special Plea in Bar, could form any part of the transactions, matters, or things which are the subject of this indictment within the meaning and intent of the "anti-trust immunity" statute.

VI.

The Special Plea in Bar filed by the defendant Molasky does not allege or show that the testimony or documents, if any, produced and provided by him before the said July

Grand Jury, and upon which said Special Plea in Bar is based, furnish any facts or information connecting the defendant Molasky with the willful attempts to evade and defeat the corporate income taxes of the said Consensus Publishing Company, due and owing for the calendar years 1933 to 1936, both inclusive.

VII.

The Special Plea in Bar filed by the defendant Molasky does not allege or show that the testimony or documents, if any, produced and provided by him before the said July Grand Jury, and upon which said Special Plea in Bar is based, furnished any truthful facts or information not theretofore available or in the possession of officers of the United States conducting or participating in the proceedings before the said June Grand Jury.

VIII.

The defendant Molasky could not have acquired immunity on account of the testimony allegedly given and the documents allegedly produced by him before the said July Grand Jury, which testimony and documents are set forth in his Special Plea in Bar and are the basis of his claim of immunity, because it does not appear from 264 the said Plea that any of the said testimony or documents could have been withheld by him in the absence of an immunity statute such as Section 32, Title 15, United States Code, since it does not appear that any of the said testimony and documents had a tendency to incriminate him within the meaning and intent of the Fifth Amendment to the Constitution of the United States, and further, since it appears that the said testimony and documents related to corporate matters and transactions.

IX.

The Special Plea in Bar does not allege or show that the defendant Molasky testified to or produced evidence, documentary or otherwise, before the said July Grand Jury with respect to the income taxes due and owing by the said Consensus Publishing Company for the calendar

years 1933 to 1936, both inclusive, or with respect to the defendant Molasky's incriminating knowledge of, or incriminating connection with the willful attempts to evade and defeat the income taxes due and owing by the said Consensus Publishing Company for the calendar years 1933 to 1936, both inclusive.

X.

The Special Plea in Bar filed by the defendant Molasky is uncertain, insufficient, vague and indefinite in that it fails to allege or show any specific question asked, answer given, or document produced, or the substance of any question asked, answer given, or document produced, which would legally serve as a basis for the claim of immunity alleged in the said Special Plea in Bar.

265 Wherefore, the United States of America prays that this Court dismiss the Special Plea in Bar filed herein by the defendant Molasky.

(Sgd) William J. Campbell,
William J. Campbell,
*United States Attorney for
the Northern District of
Illinois.*

Dated: January 15, 1940.

266

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

• • (Caption Nos.—31755, 31760, 31762, 31765-67) • •

AFFIDAVIT OF WILLIAM J. CAMPBELL, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS, IN SUPPORT OF THE GOVERNMENT'S MOTIONS TO DISMISS THE SPECIAL PLEAS OF IMMUNITY FILED HEREIN.

State of Illinois, }
County of Cook. } ss.

William J. Campbell, being duly sworn, says that he is, and at all of the times hereinafter referred to has been,

the duly appointed and acting United States Attorney for the Northern District of Illinois; that he makes this affidavit in connection with the Government's Motions to Dismiss the respective Special Pleas of Immunity filed by certain defendants herein and in opposition to said Pleas of Immunity.

That prior to the time the matters involved in these indictments were referred to the United States Attorney for investigation by a grand jury, certain of the defendants herein, to wit, Moses L. Annenberg, Walter H. Annenberg, Arnold W. Kruse, Joseph E. Hafner, James M. Ragen, Sr., James M. Ragen, Jr., and L. Stanley Kahn, at their joint request, appeared before the Attorney General of the United States in the Department of Justice at Washington, D. C., in a conference for the purpose of discussing said matters before they were referred to the

United States Attorney for the Northern District of Illinois for investigation by a grand jury; that in said conference the defendant Moses L. Annenberg and his attorneys, in the presence of the rest of said defendants attending said conference, and with their apparent consent and acquiescence, asserted to the representatives of the Attorney General that the said Moses L. Annenberg and his business associates would cooperate with the Government in every way in the matter of said investigation and would voluntarily deliver to the appropriate officials and agencies of the Government all of the books and records of the said Moses L. Annenberg and his various corporations and business enterprises which might be considered relevant to the prospective inquiry with respect to violations of the Internal Revenue Laws of the United States by these persons.

That the matter of a grand jury investigation of possible violations of the Internal Revenue Laws of the United States by Moses L. Annenberg and others was referred to the office of the United States Attorney for the Northern District of Illinois by the Attorney General of the United States in May of 1939 for presentation to and investigation by a grand jury; that he immediately proceeded in the preparation of this matter for presentation to the June 1939 Grand Jury, causing grand jury subpoenas and subpoenas duces tecum to be issued to various of the defendants herein and others who were officers or business associates of the said Moses L. Annenberg.

berg in his varied and manifold business enterprises; that said subpoenas duces tecum so issued called for the following records for the period from January 1, 1927, 268 to December 31, 1938, inclusive:

(1) All Cash Receipts and Disbursements Books; (2) All Journals; (3) All General Ledgers and other Ledgers; (4) All Daily Cash Receipt Books; (5) Charter, all By-Laws and all Minute Books; (6) All Stock Certificate Books and cancelled stock certificates; (7) All cancelled checks, check stubs, bank deposit slips, bank books and bank statements; (8) All Vouchers; (9) All Financial Reports and financial statements of receipts and disbursements from business; (10) All other books and records of account; (11) All Work Papers used in connection with the preparation of tax returns, and all retained copies of tax returns; (12) All Correspondence;

and that said subpoenas specifically calling for the books, records and documents hereinabove described were issued to and served upon the following corporations and individuals as officers thereof, respectively:

Regal Press, Inc. and Joseph E. Hafner, Secretary;

The Cecelia Company and Arnold W. Kruse, Secretary;

Telegraph Building Corporation and Joseph E. Hafner, Secretary;

M. L. Annenberg Company and Joseph E. Hafner, Treasurer;

General News Bureau, Incorporated, and James M. Ragen, Sr., President;

Illinois Nationwide News Service, Incorporated, and James M. Ragen, Sr., President;

M. L. A. Investment Company and Joseph E. Hafner, Secretary;

Form Building Corporation and Joseph E. Hafner, Secretary;

A. B. & M. Corporation and Herbert S. Kamin, Treasurer;

Nationwide News Service, Incorporated, and James M. Ragen, Sr., President;

The McMurray Publishing Company, Ltd., and Arnold W. Kruse, President;

City News Company, Ltd., and Joseph E. Hafner, Treasurer;

Triangle Press, Inc., and Arnold W. Kruse, Treasurer;

Walter Holding Corporation and Arnold W. Kruse, President;
 Crater Realty and Finance Corporation and Arnold W. Kruse, Assistant Treasurer;
 269 Montreal News Dealers Supply Company, Ltd., and Joseph E. Hafner, Treasurer;
 Nationwide News Service of Canada, Ltd., and James M. Ragen, Sr., President;
 Acme News Agency, Ltd., and Joseph E. Hafner, Vice President;
 Morning Telegraph, Incorporated, and Herbert S. Kamin, Assistant Secretary;
 Wentworth News Agency, Ltd., and Herbert S. Kamin, Secretary;
 Milwaukee News Co., and Aaron Tresch, Treasurer;
 Bentley Murray & Company and Charles W. Bidwill, President;
 R. D. Publishing Company, Inc. (Delaware), and Joseph E. Hafner, an officer;
 R. D. Publishing Company (Illinois), and Joseph E. Hafner, Vice President.
 Universal Publishing Company and Harry Friedman, President;
 Min-Haf Distributing Corporation and Joseph E. Hafner, President;
 Consensus Publishing Company and James M. Ragen, Jr., Vice President;
 and that, in addition, the books, records and documents of the unincorporated businesses of the R. D. Publishing companies in New Orleans, Los Angeles, and San Francisco were also produced in response to the foregoing subpoenas; that subpoenas duces tecum were also issued to and served upon Regal Press, Inc., and the following officers thereof:

Arnold W. Kruse, President,
 John O'Donnell, Vice President,
 Joseph E. Hafner, Secretary, and
 Herbert S. Kamin, Assistant Treasurer,

to bring and produce before the said June 1939 Grand Jury the books, records and documents of the nature hereinbefore described in their possession, custody and control, for the period from January 1, 1927, to December 31, 1938, belonging or relating to the business affairs and

income tax matters of Moses L. Annenberg, Walter 270 H. Annenberg, and Sadie C. Annenberg, wife of the said Moses L. Annenberg.

Thereafter, but several weeks before the July 1939 Grand Jury was empaneled and sworn, the said defendants herein who have filed said Special Pleas of Immunity, and who were subpoenaed as aforesaid, produced all records described in and called for by said subpoenas, which they acknowledged possession or knowledge of, to the quarters occupied by the United States Attorney in the United States Court House at Chicago, Illinois, for use by the said June 1939 Grand Jury, and in producing and delivering said documents and records the said defendants, by their attorneys, in a conference held in the office of the United States Attorney, indicated that they would comply voluntarily with the subpoenas and that said records were being voluntarily presented under said subpoenas for the use of the June 1939 Grand Jury in its said income tax investigation without any objections or reservations whatsoever, and they arranged with their accountants for the orderly production of the said records as aforesaid. That said records were retained and used by this grand jury throughout its existence, and upon its discharge, after the return of these indictments, these records were impounded by a written order of this Court duly entered.

That all of the defendants herein who appeared before the July Term 1939 Grand Jury and who have claimed immunity by virtue of their appearance before the said July Grand Jury had previously appeared before the said June Grand Jury and there testified and identified all of the documents produced by themselves and certain other witnesses under the subpoenas duces tecum hereinbefore described. The said subpoenas of the said June Grand Jury directed the production before that body of the pertinent books, records, and documents upon which 271 the above numbered indictments are based. Inasmuch as each of the defendants purported to comply with the said subpoenas of the said June Grand Jury, each of them must have delivered to the said June Grand Jury the pertinent books, records and documents and, accordingly, could not have given to the said July Grand Jury the said books, records, and documents for the calendar years involved in the said indictments.

That the July Term Grand Jury confined its work and

deliberations exclusively to the investigation of possible violations of the Sherman Anti-Trust Law by the said Moses L. Annenberg and others, which investigation, by its nature and purpose, involved issues entirely different and unrelated to the offenses considered by the said June Grand Jury and therefore would necessarily require, and was intended to require, testimony and evidence of a character independent of and unrelated to the facts and charges upon which the indictments returned by the June Grand Jury were founded. That the said anti-trust investigation by the July Grand Jury was conducted by duly appointed representatives of the Attorney General, James V. Hayes, George S. Robinson, and Sam E. Neel, who, after the July Grand Jury had been empaneled, devoted their time and efforts exclusively to that investigation.

That since the July Term Grand Jury concluded its investigation of anti-trust violations and was discharged, this affiant has learned that all of the records, documents, and papers, if any, produced before the July Term Grand Jury by any of the defendants herein were returned to them, and

this affiant states of his own knowledge that none of
272 the records, documents or papers so produced before the July Term Grand Jury and none of the testimony of any witness before the July Term Grand Jury was brought to the knowledge of or used by the June Term Grand Jury and the officers and representatives of the Government prosecuting the inquiries before that Grand Jury.

That the fact that the defendants involved in these pleas of immunity first gave their testimony and produced their documents before the said June Grand Jury, when each of them at all times possessed the right to assert his privilege against self-incrimination, coupled with the fact, which your affiant here asserts to be a fact, that none of the testimony, if any, given, or additional documents, if any, produced, by the said defendants before the said July Grand Jury was used by the said June Grand Jury in any manner or served in any manner as a basis for the indictments involved herein, removes any possibility that any of the said defendants could have believed he had been purged of any criminality other than under the so-called "Sherman anti-trust law" by anything that occurred before the said July Grand Jury.

Further, your affiant sayeth not.

Sgd. William J. Campbell.

Subscribed and sworn to before me this 15th day of January, A. D. 1940.

(SEAL)

E. L. Barker,
Notary Public.

Filed
Jan. 15,
1940.

273 And on, to wit, the 15th day of January A. D. 1940 came the United States by its attorneys and filed in the Clerk's office of said Court Motion to Dismiss Special Plea in Bar of Defendant James M. Ragen, Jr. (Immunity Plea) in words and figures following, to wit:

274 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

* * (Caption—31760) * *

**MOTION TO DISMISS SPECIAL PLEA IN BAR OF
DEFENDANT JAMES M. RAGEN, JR. (IMMUNITY
PLEA).**

Now comes the United States of America by its attorney, William J. Campbell, United States Attorney for the Northern District of Illinois, and moves this Court to dismiss the Special Plea in Bar filed herein by James M. Ragen, Jr., one of the defendants in the above numbered indictment, and shows the following in support of its said Motion:

I.

The prosecution herein exclusively relates to, and is based upon, willful attempts to evade and defeat income taxes due and owing from the Consensus Publishing Company, an Illinois corporation, to the United States of America for the calendar years 1933 to 1936, both inclusive, pursuant to the Revenue Laws of the United States. The above numbered indictment was duly returned by the Grand Jury for the Northern District of Illinois, Eastern Division, for the June Term 1939 extended for the July Term 1939, and the said indictment charges violations of Section 88 of Title 18, United States Code, and Section 145 of Title 26, United States Code. The proceedings and investigations resulting in the return of the said indictment were, and remain, under the direction of the duly ap-

pointed and acting United States Attorneys for this district.

The proceedings and investigations conducted by the Grand Jury for the July Term 1939, set out in the Special Plea in Bar filed herein by the defendant James M. Ragen, Jr., and constituting the basis for the claim of immunity of the said defendant Ragen were entirely distinct and independent proceedings from the proceedings before the said June Grand Jury, extended as aforesaid, and set out above, and, as appears from the defendant's Special Plea in Bar, the defendant Ragen knew that these proceedings before the said July Grand Jury were conducted by and under the supervision of certain Special Assistants to the Attorney General, namely James V. Hayes, George S. Robinson, and Sam E. Neel, and were concerned solely with possible violations of the Act of Congress approved July 2, 1890, as amended, commonly known as the Sherman Anti-Trust Law. The Proceedings of the said July Grand Jury in no wise whatsoever related to or concerned violations of the Revenue Laws of the United States, or conspiracies based upon such violations, all of which the defendant Ragen knew, as he admits in his Special Plea in Bar.

II.

The statute set forth in the Special Plea in Bar filed herein (Sec. 32, Title 15, U. S. Code) does not provide for immunity from prosecution for the offenses charged in the indictment, but relates solely to offenses and prosecutions arising under the said Anti-Trust Laws.

276

III.

The alleged testimony of the defendant Ragen before the said July Grand Jury was not, in fact, known to the officers appearing on behalf of the United States in the proceedings and investigations before the said June Grand Jury, nor was any of the testimony allegedly given by the said defendant before the said July Grand Jury made use of in any way in the proceedings before the said June Grand Jury, all of which appears from the affidavit of William J. Campbell, United States Attorney for the Northern District of Illinois, attached hereto as Exhibit "A"; nor does the Special Plea in Bar filed by the said defendant Ragen

allege or show that the testimony allegedly given by him before the said July Grand Jury was known to or used by the said June Grand Jury, or in any way served as a basis for the prosecution herein.

IV.

The Special Plea in Bar filed by the defendant Ragen does not allege or show that this is a prosecution for or on account of any transaction, matter, or thing concerning which he testified or produced evidence, documentary or otherwise, before the said July Grand Jury.

V.

No testimony which the defendant Ragen gave before the said July Grand Jury, which is referred to in the said Special Plea in Bar, could form any part of the transactions, matters, or things which are the subject of this indictment within the meaning and intent of the "anti-trust immunity" statute.

VI.

The Special Plea in Bar filed by the defendant Ragen does not allege or show that the testimony, if any, produced and provided by him before the said July Grand Jury, and upon which said Special Plea in Bar is based, furnish any facts or information connecting the defendant Ragen with the willful attempts to evade and defeat the corporate income taxes of the said Consensus Publishing Company due and owing for the calendar years 1933 to 1936, both inclusive.

VII.

The Special Plea in Bar filed by the defendant Ragen does not allege or show that the testimony, if any, produced and provided by him before the said July Grand Jury, and upon which said Special Plea in Bar is based, furnished any truthful facts or information not theretofore available or in the possession of officers of the United States conducting or participating in the proceedings before the said June Grand Jury.

VIII.

The defendant, Ragen, could not have acquired immunity on account of the testimony allegedly given by him before the said July Grand Jury, which testimony is set forth in his Special Plea in Bar and is the basis of his claim of immunity, because it does not appear from the said Plea that any of the said testimony could have been withheld by him in the absence of an immunity statute such as Section 32, Title 15, United States Code, since it does not appear that any of the said testimony had a tendency to incriminate him within the meaning and intent of the Fifth Amendment to the Constitution of the United States, and further, since it appears that the said testimony related to corporate matters and transactions.

278

IX.

The Special Plea in Bar does not allege or show that the defendant Ragen testified to or produced evidence, documentary or otherwise, before the said July Grand Jury with respect to the income taxes due and owing by the said Consensus Publishing Company for the calendar years 1933 to 1936, both inclusive, or with respect to the defendant Ragen's incriminating knowledge of, or incriminating connection with the willful attempts to evade and defeat the income taxes due and owing by the said Consensus Publishing Company for the calendar years 1933 to 1936, both inclusive.

X.

The Special Plea in Bar filed by the defendant Ragen is insufficient, vague, and indefinite, and fails to allege or show any specific question asked or answer given, or the substance of any question asked, or answer given, which would legally serve as a basis for the claim of immunity alleged in the said Special Plea in Bar.

Wherefore, the United States of America prays that this Court dismiss the Special Plea in Bar filed herein by the defendant Ragen.

Sgd. William J. Campbell,
William J. Campbell,
*United States Attorney for the
Northern District of Illinois.*

Dated: January 15, 1940.

IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

• • (Caption Nos.—31755, 31750, 31762, 31765-67) • •

AFFIDAVIT OF WILLIAM J. CAMPBELL, UNITED
STATES ATTORNEY FOR THE NORTHERN DIS-
TRICT OF ILLINOIS, IN SUPPORT OF THE GOV-
ERNMENT'S MOTIONS TO DISMISS THE SPECIAL
PLEAS OF IMMUNITY FILED HEREIN.

State of Illinois, {
County of Cook. } ss.

William J. Campbell, being duly sworn, says that he is, and at all of the times hereinafter referred to has been, the duly appointed and acting United States Attorney for the Northern District of Illinois; that he makes this affidavit in connection with the Government's Motions to Dismiss the respective Special Pleas of Immunity filed by certain defendants herein and in opposition to said Pleas of Immunity.

That prior to the time the matters involved in these indictments were referred to the United States Attorney for investigation by a grand jury, certain of the defendants herein, to wit, Moses L. Annenberg, Walter H. Annenberg, Arnold W. Kruse, Joseph E. Hafner, James M. Ragen, Sr., James M. Ragen, Jr., and L. Stanley Kahn, at their joint request, appeared before the Attorney General of the United States in the Department of Justice at Washington,

D. C., in a conference for the purpose of discussing
280 said matters before they were referred to the United

States Attorney for the Northern District of Illinois for investigation by a grand jury; that in said conference the defendant Moses L. Annenberg and his attorneys, in the presence of the rest of said defendants attending said conference, and with their apparent consent and acquiescence, asserted to the representatives of the Attorney General that the said Moses L. Annenberg and his business associates would cooperate with the Government in every way in the matter of said investigation and would voluntarily deliver to the appropriate officials and agencies of

the Government all of the books and records of the said Moses L. Annenberg and his various corporations and business enterprises which might be considered relevant to the prospective inquiry with respect to violations of the Internal Revenue Laws of the United States by these persons.

That the matter of a grand jury investigation of possible violations of the Internal Revenue Laws of the United States by Moses L. Annenberg and others was referred to the office of the United States Attorney for the Northern District of Illinois by the Attorney General of the United States in May of 1939 for presentation to and investigation by a grand jury; that he immediately proceeded in the preparation of this matter for presentation to the June 1939 Grand Jury, causing grand jury subpoenas and subpoenas duces tecum to be issued to various of the defendants herein and others who were officers or business associates of the said Moses L. Annenberg in his varied and manifold business enterprises; that said subpoenas duces tecum so issued called for the following records for the 281 period from January 1, 1927, to December 31, 1938, inclusive:

(1) All Cash Receipts and Disbursements Books; (2) All Journals; (3) All General Ledgers and other Ledgers; (4) All Daily Cash Receipt Books; (5) Charter, all By-Laws and all Minute Books; (6) All Stock Certificate Books and cancelled stock certificates; (7) All cancelled checks, check stubs, bank deposit slips, bank books and bank statements; (8) All Vouchers; (9) All Financial Reports and financial statements of receipts and disbursements from business; (10) All other books and records of account; (11) All Work Papers used in connection with the preparation of tax returns, and all retained copies of tax returns; (12) All Correspondence;

and that said subpoenas specifically calling for the books, records and documents hereinabove described were issued to and served upon the following corporations and individuals as officers thereof, respectively:

Regal Press, Inc., and Joseph E. Haffner, Secretary;
The Cecelia Company and Arnold W. Kruse, Secretary;
Telegraph Building Corporation and Joseph E. Haffner,

Secretary;

M. L. Annenberg Company and Joseph E. Haffner,
Treasurer;

General News Bureau, Incorporated, and James M.
Ragen, Sr., President;

Illinois Nationwide News Service, Incorporated, and James M. Ragen, Sr., President;

M. L. A. Investment Company and Joseph E. Hafner, Secretary;

Form Building Corporation and Joseph E. Hafner, Secretary;

A. B. & M. Corporation and Herbert S. Kamin, Treasurer;

Nationwide News Service, Incorporated, and James M. Ragen, Sr., President;

The McMurray Publishing Company, Ltd., and Arnold W. Kruse, President;

City News Company, Ltd., and Joseph E. Hafner, Treasurer;

Triangle Press, Inc., and Arnold W. Kruse, Treasurer;

Walter Holding Corporation and Arnold W. Kruse, President;

Crater Realty and Finance Corporation and Arnold W. Kruse, Assistant Treasurer;

282 Montreal News Dealers Supply Company, Ltd., and Joseph E. Hafner, Treasurer;

Nationwide News Service of Canada, Ltd., and James M. Ragen, Sr., President;

Acme News Agency, Ltd., and Joseph E. Hafner, Vice President;

~~Morning~~ Telegraph, Incorporated, and Herbert S. Kamin, Assistant Secretary;

Wentworth News Agency, Ltd., and Herbert S. Kamin, Secretary;

Milwaukee News Co. and Aaron Trosch, Treasurer;

Bentley Murray & Company and Charles W. Bidwill, President;

R. D. Publishing Company, Inc. (Delaware), and Joseph E. Hafner, an officer;

R. D. Publishing Company (Illinois), and Joseph E. Hafner, Vice President;

Universal Publishing Company and Harry Friedman, President;

Min-Haf Distributing Corporation and Joseph E. Hafner, President;

Consensus Publishing Company and James M. Ragen, Jr., Vice President;

and that, in addition, the books, records and documents of the unincorporated businesses of the R. D. Publishing companies in New Orleans, Los Angeles, and San Francisco

were also produced in response to the foregoing subpoenas; that subpoenas duces tecum were also issued to and served upon Regal Press, Inc., and the following officers thereof:

Arnold W. Kruse, President,
John O'Donnell, Vice President,
Joseph E. Hafner, Secretary,

and

Herbert S. Kamin, Assistant Treasurer,
to bring and produce before the said June 1939 Grand Jury the books, records and documents of the nature hereinbefore described in their possession, custody and control, for the period from January 1, 1927, to December 31, 1938, belonging or relating to the business affairs and income tax matters of Moses L. Annenberg, Walter H. Annenberg, 283 berg, and Sadie C. Annenberg, wife of the said Moses L. Annenberg.

Thereafter, but several weeks before the July 1939 Grand Jury was empaneled and sworn, the said defendants herein who have filed said Special Pleas of Immunity, and who were subpoenaed as aforesaid, produced all records described in and called for by said subpoenas, which they acknowledged possession or knowledge of, to the quarters occupied by the United States Attorney in the United States Court House at Chicago, Illinois, for use by the said June 1939 Grand Jury, and in producing and delivering said documents and records the said defendants, by their attorneys, in a conference held in the office of the United States Attorney, indicated that they would comply voluntarily with the subpoenas and that said records were being voluntarily presented under said subpoenas for the use of the June 1939 Grand Jury in its said income tax investigation without any objections or reservations whatsoever, and they arranged with their accountants for the orderly production of the said records as aforesaid. That said records were retained and used by this grand jury throughout its existence, and upon its discharge, after the return of these indictments, these records were impounded by a written order of this Court duly entered.

That all of the defendants herein who appeared before the July Term 1939 Grand Jury and who have claimed immunity by virtue of their appearance before the said July Grand Jury had previously appeared before the said June Grand Jury and there testified and identified all of the documents produced by themselves and certain other witnesses under the subpoenas duces tecum hereinbefore de-

scribed. The said subpoenas of the said June Grand Jury directed the production before that body of the pertinent books, records, and documents upon which the above numbered indictments are based. Inasmuch as each of the defendants purported to comply with the said subpoenas of the said June Grand Jury, each of them must have delivered to the said June Grand Jury the pertinent books, records and documents and, accordingly, could not have given to the said July Grand Jury the said books, records, and documents for the calendar years involved in the said indictments.

That the July Term Grand Jury confined its work and deliberations exclusively to the investigation of possible violations of the Sherman Anti-Trust Law by the said Moses L. Annenberg and others, which investigation, by its nature and purpose, involved issues entirely different and unrelated to the offenses considered by the said June Grand Jury and therefore would necessarily require, and was intended to require, testimony and evidence of a character independent of and unrelated to the facts and charges upon which the indictments returned by the June Grand Jury were founded. That the said anti-trust investigation by the July Grand Jury was conducted by duly appointed representatives of the Attorney General, James V. Hayes, George S. Robinson, and Sam E. Neel, who, after the July Grand Jury had been empaneled, devoted their time and efforts exclusively to that investigation.

That since the July Term Grand Jury concluded its investigation of anti-trust violations and was discharged, this affiant has learned that all of the records, documents, and papers, if any, produced before the July Term Grand Jury by any of the defendants herein were returned to them, and this affiant states of his own knowledge that none of the records, documents or papers so produced before the July Term Grand Jury and none of the testimony of any witness before the July Term Grand Jury was brought to the knowledge of or used by the June Term Grand Jury and the officers and representatives of the Government prosecuting the inquiries before that Grand Jury.

That the fact that the defendants involved in these pleas of immunity first gave their testimony and produced their documents before the said June Grand Jury, when each of them at all times possessed the right to assert his privilege

against self-incrimination, coupled with the fact, which your affiant here asserts to be a fact, that none of the testimony, if any, given, or additional documents, if any, produced, by the said defendants before the said July Grand Jury was used by the said June Grand Jury in any manner or served in any manner as a basis for the indictments involved herein, removes any possibility that any of the said defendants could have believed he had been purged of any criminality other than under the so-called "Sherman anti-trust law" by anything that occurred before the said July Grand Jury.

Further, your affiant sayeth not.

Sgd. William J. Campbell.

Subscribed and sworn to before me this 15th day of January, A. D. 1940.

E. L. Barker,
Notary Public.

(Seal)

286 And on, to wit, the 18th day of January A. D. 1940 came the defendants by their attorneys and filed in the Clerk's office of said Court certain Motion to Strike in words and figures following, to wit:

Filed
Jan. 18,
1940.

287 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

MOTION TO STRIKE THE AFFIDAVIT OF WILLIAM J. CAMPBELL, UNITED STATES ATTORNEY, FROM THE FILES IN SAID CAUSE, ETC.

Now come James M. Ragen, Jr., and William Molasky, defendants to the above numbered indictment, by their respective attorneys, and move the court to strike from the files in this cause and of this court the affidavit of William J. Campbell, United States Attorney for the Northern District of Illinois, filed in this cause as Exhibit "A" attached to the several motions heretofore filed by the United States to dismiss the several special pleas in bar heretofore filed in this cause by these respective defendants praying the court to dismiss said indictment and each and every count thereof, as to these defendants respectively, and to discharge these defendants and each of them, for

the reason that each of these defendants has received 288 immunity from prosecution and from being subjected to any penalty or forfeiture for or on account of the transactions, matters and things charged against him in said indictment and each and every count thereof pursuant to the Constitution and laws of the United States; and as grounds for this motion to strike said affidavit from the files as aforesaid these defendants respectfully show unto the court the following:

1. Under the law, the United States must elect whether it will demur to the special pleas severally filed by these defendants and thus raise issues of law thereon, or will answer the facts alleged therein by way of denial or avoidance, so that issues of fact may be joined and a trial had upon said issues of fact in the manner provided by law.

2. The aforesaid motions by the United States to dismiss defendants' special pleas in bar, taken alone and without said affidavit, are, in substance and effect, demurrers to said special pleas respectively which admit all allegations of fact contained in said special pleas and raise only questions of law as to those matters and things which are alleged by said special pleas, and said affidavit makes allegations of facts and states matters of argument designed to avoid the facts and the effect of the facts alleged by these defendants in their respective special pleas in

bar; and there is no warrant or authority in law nor 289 in the rules of this court for the filing, in connection with and as a part of said motions to dismiss, of an affidavit setting up facts which deny the facts or introducing additional facts seeking to avoid the effect of the facts set up in said special pleas.

3. Said affidavit and all matters and things therein contained are irrelevant, immaterial, and impertinent to any issue or issues of law raised by the filing of said motions to dismiss defendants' aforesaid special pleas in bar.

4. Said affidavit purports to state facts which do not appear of record from defendants' special pleas in bar or any of them, the truth of which alleged facts cannot be heard or determined by the court upon the argument of said motions to dismiss.

5. Said affidavit purports to allege facts not proper to be heard or determined upon the argument of said motions to dismiss in denial of defendants' right to join issue on any facts that are alleged in opposition to their said spe-

cial pleas in bar, to subpoena, examine and cross-examine witnesses, and to have any and all issues of fact determined after a full hearing in the manner provided by law.

290 6. Said affidavit purports to state facts which, in the present state of the record, these defendants are afforded no opportunity to answer or controvert; and if said affidavit is permitted to remain in the files of this cause as a part of said motions to dismiss, it will erroneously appear, to the prejudice of these defendants, that these defendants have not answered or denied said facts.

In the alternative, defendants move the court to enter an order, determining and declaring that said so-called "motions to dismiss" with the said affidavit attached thereto constitute and are a replication by the Government to these defendants' said special pleas in bar, granting to these defendants leave to answer and deny any or all of the allegations of fact contained in said affidavit, to join issue thereon, to subpoena, examine and cross-examine witnesses, and to have such issues of fact determined after full hearing in the manner provided by law, and setting said issues for trial and disposition in the manner provided by law.

Kirkland, Fleming, Green, Martin &
Ellis,

*Attorneys for defendant, James
M. Ragen, Jr.*

David Baron,

*Attorney for defendant, William
Molasky.*

291 And on, to wit, the 13th day of February A. D. 1940 came the defendant by his attorneys and filed in the Clerk's office of said Court a certain Motion for Leave to File Amended Special Plea in Bar (Immunity Plea) in words and figures following, to wit:

Filed
Feb. 13,
1940.

292 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

**MOTION FOR LEAVE TO FILE AMENDED SPECIAL
PLEA IN BAR OF DEFENDANT WILLIAM MO-
LASKY (IMMUNITY PLEA).**

Now comes William Molasky, one of the defendants in the above numbered indictment, by his attorney, and moves the Court for leave to file the Amended Special Plea in Bar (Immunity Plea) a copy of which is attached hereto, for the reason that certain additional facts have come to the knowledge of defendant's attorney since the time of the filing of the Special Plea in Bar of said defendant, which facts are embodied in said Amended Special Plea in Bar and are important for the proper determination of defendant's constitutional and statutory rights raised by said special plea.

David Baron,

Attorney for defendant William Molasky.

293 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

**AMENDED SPECIAL PLEA IN BAR OF DEFENDANT
WILLIAM MOLASKY (IMMUNITY PLEA).**

Now comes William Molasky, one of the defendants to the above numbered indictment, by his attorneys, and presents this his special plea in bar to said indictment No. 31760, returned herein on the 22nd day of August, 1939, and to each and every count thereof, and says that the United States of America ought not to prosecute further the aforesaid indictment nor any count thereof against this defendant, and prays the court to dismiss said indictment and each and every count thereof, as to this defendant, and to discharge this defendant, for the reason that this defendant has received immunity from prosecution and from being subjected to any penalty or forfeiture for or on account of the transactions, matters, and things charged against him in said indictment and each and every count thereof, pursuant to the Constitution and laws of

the United States, including the provisions of Sections 32 and 35 of Title 15 of the United States Code, all as hereinafter more fully set forth in this special plea in bar:

1. This indictment No. 31760 was returned on the 22nd day of August, 1939, by the grand jury for the June term, 1939, extended for the July term, 1939.

294 2. On or about July 6, 1939, there was impaneled another grand jury for the Northern District of Illinois, Eastern Division, being the grand jury for the July term, 1939, which said second grand jury conducted investigations during a period which was contemporaneous with the extended term of the aforesaid grand jury for the June term, 1939.

3. Said grand jury for the July term, 1939, conducted an investigation of alleged violations of the Anti-Trust Laws of the United States on the part of some of the persons who are parties defendant to this indictment and on the part of persons associated with said parties defendant, as more fully shown by the presentment returned in this court by said grand jury on to-wit, the 23rd day of August, 1939, reference thereto being had.

4. The Fifth Amendment to the Constitution of the United States reads in part as follows:

"No person shall . . . be compelled in any Criminal Case to be a witness against himself, . . ."

5. For the purpose of compelling the testimony of witnesses and the production of evidence in any proceeding, suit or prosecution under the Anti-Trust Laws of the United States, Congress has enacted Section 32 of Title 15 of the United States Code, which provides:

"Sec. 32. Immunity of witness. No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1 to 27, inclusive, of this chapter: Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

295 6. On July 7, 1939, this defendant was duly served with a subpoena issued by the District Court of the United States for the Northern District of Illinois, Eastern Division, on July 6, 1939, commanding him to appear before the Grand Jury of said Court in the Federal Building in the City of Chicago in said district on July 17, 1939,

to testify in behalf of the United States generally, and not depart without leave of the Court or District Attorney. A copy of said subpoena is attached to this special plea in bar, marked Exhibit A and by this reference made a part hereof.

7. On or about July 12, 1939, this defendant was duly served with a subpoena duces tecum, which was issued by the District Court of the United States for the Northern District of Illinois, Eastern Division, on July 11, 1939, commanding him to appear before the Grand Jury of said Court, in the Federal Building, Room 450, in the City of Chicago, in said District on July 17, 1939, and testify in behalf of the United States and also requiring him to produce before said grand jury on behalf of the United States the following documents and records, together with other documents and records therein described:

(1) All records of collections and disbursements of the Consensus Publishing Company during the period January 1, 1927, to December 31, 1938;

(2) All records of the quantity of racing forms published and distributed by the Consensus Publishing Company from January 1, 1927 to December 31, 1938;

(3) All contracts between William Molasky and the Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(4) All cancelled checks issued by William Molasky on his personal bank accounts payable to, or endorsed by, the following individuals or corporations; M. L. Annenberg, Cecelia Investment Company, The Cecelia Company, the Consensus Publishing Company, Arnold W. Kruse, Joseph E. Hafner, Clarence L. Owen, Paul B. Brown, Hal 296 Langan and Joseph Ottenstein, during the period January 1, 1927 to December 31, 1938.

(5) All cancelled checks issued by the said William Molasky payable to or endorsed by the following persons: Sam Fuer, Jack Meyer, Charles Lewis, B. McQuillian and Mr. Jacobs;

(6) All Minute Books containing notes of meetings of stockholders and Boards of Directors of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and Consensus Publishing Company during the period January 1, 1927, to December 31, 1938;

(7) All stock certificate records containing the stubs of all stock certificates issued, and all cancelled certificates

of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and the Consensus Publishing Company.

A copy of said subpoena duces tecum so served upon this defendant is attached to this special plea in bar, marked Exhibit B, and by this reference made a part hereof.

8. On July 18, 1939, this defendant was duly served with a subpoena issued by the District Court of the United States for the Northern District of Illinois, Eastern Division, on July 18, 1939, commanding him to appear before the Grand Jury of said Court at Chicago in the District aforesaid, on July 18, 1939, to testify in behalf of the United States generally, and not depart without leave of the Court or District Attorney. A copy of said subpoena is attached to this special plea in bar, marked Exhibit C and by this reference made a part hereof. Said grand jury for the July term, 1939, was then and there conducting the investigation hereinabove referred to concerning transactions, matters and things claimed to be in violation of the Anti-Trust Laws of the United States, and said subpoenas and subpoena duces tecum were issued and served upon this defendant in connection with and in aid of said investigation.

9. James V. Hayes, George S. Robinson and Sam E. Neel, special assistants to the Attorney General of the United States, were the attorneys for the United States in charge of conducting said anti-trust investigation then being conducted by and before said grand jury for the July term 1939. Said Hayes, Robinson and Neel were present before the grand jury for the June term 1939, during a substantial part of the proceedings before said grand jury, and while the investigation resulting in the return of the indictment in this cause was in progress and while witnesses called in said investigation were present and were testifying under oath before said grand jury.

10. Thereafter, pursuant to and in accordance with said subpoenas and subpoena duces tecum, but solely by reason of the compulsion and threat thereof and for no other reason whatsoever, this defendant, on to-wit, the 24th, 25th, 26th, 27th and 28th days of July, 1939, appeared before said grand jury for the July term 1939, and after this defendant had been sworn and had testified concerning his name and address, stated that he had been advised by his attorney that he had a Constitutional privilege against testifying to anything before said Grand Jury that might tend to incriminate him personally; that he had been con-

nected for many years with the Annenberg organization and therefore more or less actively engaged in the business then being investigated; that he wanted it specifically understood that he was asserting his Constitutional privilege against self-incrimination, and refused to answer all questions unless granted immunity from prosecution; that he also wanted it understood that as to each and every question put to him that might tend to incriminate him personally, he would not have to object specifically and his claim of immunity was to apply to all matters about which he might be required to testify before said Grand Jury. Whereupon James V. Hayes stated to this defendant, in substance, in the presence of said grand jury, and to the said grand jury that the attorneys for the United States had decided to grant immunity to this defendant and that this defendant was thereby granted immunity on all matters and questions put to him by or before said grand jury and that such immunity would apply to any and all matters, transactions, and things as to which he might testify.

11. Having been advised by his counsel that by virtue of the aforesaid section of the Anti-Trust laws relating to immunity he was, upon being granted immunity, required by law to testify and to produce evidence, documentary or otherwise, this defendant, on to-wit, the 24th, 25th, 26th, 27th and 28th days of July, 1939, testified at length as a witness on behalf of the United States before said grand jury for the July term, 1939, and answered each and every question put to him by or before said grand jury.

12. In obedience to the command of said subpoena and subpoena duces tecum and pursuant to the immunity granted to this defendant, as aforesaid, defendant was required to testify before said grand jury for the July term 1939; and in response to questions put to him before said grand jury, this defendant gave oral testimony before said grand jury concerning, relating to and directly proving the following transactions, matters and things, among others:

(a) The facts and transactions leading up to the organization and incorporation of the defendant Consensus Publishing Company;

(b) The transactions with reference to the capital stock of the defendant Consensus Publishing Company and the ownership of same from the time of its incorporation to the

time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive;

(c) The agreements and employment contracts with reference to commissions and salaries to be paid by Consensus Publishing Company to this defendant, William Molasky, and to Arnold W. Kruse, Lester A. Kruse, Bee Hoffman, James M. Ragen and James M. Ragen, Jr. from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive and the payments of commissions and salaries by the Consensus Publishing Company to the 299 said individuals during said period of time, and the duties performed by each of said individuals for and in behalf of said defendant Consensus Publishing Company during said time;

(d) The expenses of the defendant Consensus Publishing Company including all commissions paid, from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive;

(e) The dividends paid by the defendant Consensus Publishing Company from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive; and concerning and relative to:

(f) The tax returns made by the defendants Consensus Publishing Company from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive.

13. In the course of his examination before said grand jury for the July term 1939, particularly with reference to the items enumerated in paragraphs 11 and 12 above, this defendant was compelled to give answers and to produce evidence, relating to and tending to connect him with the allegations of this indictment, and thereby disclosed to said grand jury and the attorneys for the United States information material and relevant to the transactions, matters and things alleged against him in this indictment and each and every count thereof; and to the extent that this defendant may have committed any crime or crimes against the United States as charged in this indictment, or any count thereof, this defendant by his testimony, thus compelled and given before said grand jury for the July term, 1939, as aforesaid, disclosed facts which tend to prove ma-

terial allegations of said indictment, and each and every count thereof, and which would be necessary links in a chain of evidence to establish the guilt of this defendant thereunder and to incriminate this defendant.

And this defendant avers and submits that under and by virtue of the Constitution and laws of the United States and because of the premises aforesaid, he cannot be prosecuted or subjected to any penalty or forfeiture for or on account of the transactions, matters, and things, or any or either of them, which are in this indictment and each and every count thereof mentioned and charged against this defendant, and all of this said defendant is ready to verify.

Wherefore, defendant, William Molasky, prays judgment that this said indictment against him and each and every count thereof be dismissed and set aside as to him and that he be discharged and go hence without day.

David Baron,

Attorney for defendant, William Molasky.

United States of America }
State of Missouri } ss.
City of St. Louis }

William Molasky, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing amended special plea in bar in his behalf and knows the contents thereof and that the same is true.

William Molasky.

Subscribed and sworn to before me this 12 day of February, A. D. 1940.

My term expires Nov. 2, 1941.

(Seal)

Maurice J. Rounpa,
Notary Public.

301

EXHIBIT A.

District Court of the United States of America, }
Northern District of Illinois, } ss.
Eastern Division.

THE UNITED STATES OF AMERICA.

To the Marshal of the Eastern District of Missouri,
Greeting:

We command you to summon William Molasky, 1401 Mart Building, St. Louis, Missouri, if found in your District, to be and appear before our Grand Jury of the District Court of the United States for the Northern District of Illinois, Eastern Division, at Chicago, in the District aforesaid, on the 17th day of July, A. D. 1939, at ten o'clock A. M. to testify in behalf of the United States generally, and not depart without leave of the Court or District Attorney. And this you shall in no wise omit under penalty of the law in that case made and provided. And have you then and there this writ.

Witness the Honorable James H. Wilkerson, Judge of the said Court, at Chicago, in said district, this 6th day of July, in the year of our Lord one thousand nine hundred and thirty-nine and of the independence of the United States of America the 164th year.

Hoyt King,
Clerk.

(Seal)

Subpoena Duces Tecum

DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois.

July Term, 1939.

.The President of the United States of America

To William Molasky,
1401 Mart Building,
12th and Spruce Streets,
St. Louis, Missouri,

You Are Hereby Commanded that laying aside all and singular your business and excuses you be and appear before the Grand Jury of the District Court of the United States for the Northern District of Illinois, in the Federal Building, Room 450, in the City of Chicago, in said District on the 17th day of July, A. D. 1939, at ten o'clock A. M. of said day, and to bring and produce at the time and place aforesaid, the following records in his possession or control:

(1) All records of collections and disbursements of the Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(2) All records of the quantity of racing forms published and distributed by the Consensus Publishing Company from January 1, 1927 to December 31, 1938;

(3) All contracts between William Molasky and the Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(4) All contracts between William Molasky and the following: Pioneer News Service, Inc., The Molasky Company, The Molasky Holding Company, Paul Brown, Clarence L. Owen, Daily Racing Form Publishing Company, R. D. Publishing Company, Louisiana News Company, Inc., Kansas City News Distributors, Inc.;

(5) All records of collections and disbursements during the period of January 1, 1927 to December 31, 1938, of the Pioneer News Service, Inc., including copies of
303 weekly reports of income and disbursements, and all cancelled checks issued by the Pioneer News Service.

Inc., on a bank account maintained under the name of Central News Service Company;

(6) All cancelled checks issued by William Molasky on his personal bank accounts payable to, or endorsed by, the following individuals or corporations; M. L. Annenberg, Cecelia Investment Company, The Cecelia Company, the Consensus Publishing Company, Arnold W. Kruse, Joseph E. Hafner, Clarence L. Owen, Paul B. Brown, Hal Langan and Joseph Ottenstein, during the period January 1, 1927 to December 31, 1938;

(7) All cancelled checks issued by the said William Molasky payable to or endorsed by the following persons: Sam Fuer, Jack Meyer, Charles Lewis, B. McQuillian and Mr. Jacobs;

(8) All Minute Books containing notes of meetings of stockholders and Boards of Directors of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and Consensus Publishing Company during the period January 1 1927 to December 31, 1938;

(9) All stock certificate records containing the stubs of all stock certificates issued, and all cancelled certificates of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and the Consensus Publishing Company. on behalf of the United States, and not depart the Court without leave there f or of the District Attorney.

Hereof Fail Not under penalty of what may befall you thereon.

To the Marshal of the Eastern District of Missouri to execute and return in due form of law.

Witness, the Honorable James H. Wilkerson District Judges of the United States, this 11th day of July A. D. 1939, and in the 164th year of the Independence of the United States of America.

Hoyt King,
Clerk.

(Seal)

A true copy teste

Hoyt King,
Clerk.

July 11th 1939.

EXHIBIT C.

District Court of the United States of America, }
 Northern District of Illinois, } ss:
 Eastern Division. }

The President of the United States of America.

To the Marshal of the Eastern District of Missouri—
 Greeting:

We Command You To Summon, William Molasky, 2 Aberdeen Place, St. Louis, Missouri, if found in your District, to be and appear before our Grand Jury of the District Court of the United States for the Northern District of Illinois, Eastern Division, at Chicago, in the District aforesaid, on the 18th day of July, A. D. 1939 at 10:00 o'clock A. M., to testify in behalf of the United States generally, and not depart without leave of the Court or District Attorney. And this you shall in no wise omit under the penalty of the law in that case made and provided. And have you then and there this writ.

Witness the Hon. James H. Wilkerson, Judge of the said Court, at Chicago, in said District, this 18th day of July, in the year of our Lord one thousand nine hundred and thirty-nine and of the independence of the United States of America the 164th year.

Hoyt King,
 Clerk.

(Seal of District)
 (Court of United)
 (States, Northern)
 (District 1853—)
 (Illinois.)

305 Endorsed: In the District Court of the United States. * * (Caption—31769) * * Motion for Leave to File Amended Special Plea in Bar of Defendant William Molasky (Immunity Plea). Filed Feb. 13, 1940. Hoyt King, Clerk.

416 And on, to wit, the 16th day of February A. D. 1940 came the defendant by his attorney and filed in the Clerk's office of said Court a certain Motion for Leave to Withdraw Special Plea in Bar (Immunity Plea) in words and figures following, to wit:

417 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

Filed
Feb. 16,
1940.

MOTION FOR LEAVE TO WITHDRAW SPECIAL
PLEA IN BAR OF DEFENDANT WILLIAM MOLA-
SKY (IMMUNITY PLEA).

Now comes William Molasky, one of the defendants in the above numbered indictment, by his attorney, and moves the Court for leave to withdraw his Special Plea in Bar (Immunity Plea) for the reason that said defendant desires to file an Amended Special Plea in Bar (Immunity Plea), motion for leave to file which is now pending.

David Baron,

Attorney for defendant William Molasky.

418 Endorsed: In the District Court of the United States. • • (Caption—31760) • • Motion for Leave to Withdraw Special Plea in Bar of Defendant William Molasky (Immunity Plea). Filed Feb. 16, 1940, Hoyt King, Clerk.

419 And afterwards, to wit, on the 1st day of April A. D. 1940, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson District Judge appears the following entry, to wit:

Entered
Apr. 1,
1940.

420 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

Monday April 1, A. D. 1940.

Present: Honorable James H. Wilkerson, Judge.

On motion of the Attorney for the defendant William Molasky It Is Ordered that leave be and the same is hereby given the said defendant nunc pro tunc as of January 5, A. D. 1940 to file demurrer to the indictment filed herein against him and leave be and the same is hereby given the said defendant to file instantan an amended plea in bar whereupon the United States Attorney enters his motion to dismiss the amended plea in bar which motion is entered and continued.

Entered
Apr. 1,
1940.

435 And afterwards, to wit, on the 1st day of April A. D. 1940, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson District Judge appears the following entry, to wit:

436 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

ORDER GRANTING LEAVE TO FILE AMENDED
SPECIAL PLEA IN BAR OF DEFENDANT WIL-
LIAM MOLASKY (IMMUNITY PLEA).

This cause coming on to be heard on motion of defendant William Molasky for leave to file an Amended Special Plea in Bar (Immunity Plea) and the Court now being fully advised orders and adjudges that the said Amended Special Plea in Bar of Defendant William Molasky (Immunity Plea) be and the same is now filed.

James H. Wilkerson,
Judge.

Enter April 1, 1940.

Filed
Apr. 1,
1940.

421 And on, to wit, the 1st day of April, A. D. 1940, came the defendant by his attorneys and filed in the Clerk's office of said Court Amended Special Plea in Bar (Immunity Plea) in words and figures following, to wit:

422 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

AMENDED SPECIAL PLEA IN BAR OF DEFEND-
ANT WILLIAM MOLASKY (IMMUNITY PLEA).

Now comes William Molasky, one of the defendants to the above numbered indictment, by his attorneys, and presents this his special plea in bar to said indictment No. 31760, returned herein on the 22nd day of August, 1939, and to each and every count thereof, and says that the United States of America ought not to prosecute further the aforesaid indictment nor any count thereof against this defendant, and prays the court to dismiss

said indictment and each and every count thereof, as to this defendant, and to discharge this defendant, for the reason that this defendant has received immunity from prosecution and from being subjected to any penalty or forfeiture for or on account of the transactions, matters, and things charged against him in said indictment and each and every count thereof, pursuant to the Constitution and laws of the United States, including the provisions of Sections 32 and 33 of Title 15 of the United States Code, all as hereinafter more fully set forth in this special plea in bar:

1. This indictment No. 31760 was returned on the 22nd day of August, 1939, by the grand jury for the June term, 1939, extended for the July term, 1939.

423 2. On or about July 6, 1939, there was impaneled another grand jury for the Northern District of Illinois, Eastern Division, being the grand jury for the July term, 1939, which said second grand jury conducted investigations during a period which was contemporaneous with the extended term of the aforesaid grand jury for the June term, 1939.

3. Said grand jury for the July term, 1939, conducted an investigation of alleged violations of the Anti-Trust Laws of the United States on the part of some of the persons who are parties defendant to this indictment and on the part of persons associated with said parties defendant, as more fully shown by the presentment returned in this court by said grand jury on to-wit, the 23rd day of August, 1939, reference thereto being had.

4. The Fifth Amendment to the Constitution of the United States reads in part as follows:

"No person shall . . . be compelled in any Criminal Case to be a witness against himself, . . ."

5. For the purpose of compelling the testimony of witnesses and the production of evidence in any proceeding, suit or prosecution under the Anti-Trust Laws of the United States, Congress has enacted Section 32 of Title 15 of the United States Code, which provides:

"Sec. 32. Immunity of witness. No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1 to 27, inclusive, of this chap-

ter: Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

424 6. On July 7, 1939, this defendant was duly served with a subpoena issued by the District Court of the United States for the Northern District of Illinois, Eastern Division, on July 6, 1939, commanding him to appear before the Grand Jury of said Court in the Federal Building in the City of Chicago in said District on July 17, 1939, to testify in behalf of the United States generally, and not depart without leave of the Court or District Attorney. A copy of said subpoena is attached to this special plea in bar, marked Exhibit A and by this reference made a part hereof.

7. On or about July 12, 1939, this defendant was duly served with a subpoena duces tecum, which was issued by the District Court of the United States for the Northern District of Illinois, Eastern Division, on July 11, 1939, commanding him to appear before the Grand Jury of said Court, in the Federal Building, Room 450, in the City of Chicago, in said District on July 17, 1939, and testify in behalf of the United States and also requiring him to produce before said grand jury on behalf of the United States the following documents and records, together with other documents and records therein described:

(1) All records of collections and disbursements of the Consensus Publishing Company during the period January 1, 1927, to December 31, 1938;

(2) All records of the quantity of racing forms published and distributed by the Consensus Publishing Company from January 1, 1927 to December 31, 1938;

(3) All contracts between William Molasky and the Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(4) All cancelled checks issued by William Molasky on his personal bank accounts payable to, or endorsed by, the following individuals or corporations; M. L. Annenberg, Cecelia Investment Company, The Cecelia Company, the Consensus Publishing Company, Arnold W. Kruse, Joseph E. Hafner, Clarence L. Owen, Paul B. Brown, Hal Langan and Joseph Ottenstein, during
425 the period January 1, 1927 to December 31, 1938.

(5) All cancelled checks issued by the said William Molasky payable to or endorsed by the following

persons: Sam Fuer, Jack Meyer, Charles Lewis, B. McQuillian and Mr. Jacobs;

(6) All Minute Books containing notes of meetings of stockholders and Boards of Directors of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and Consensus Publishing Company during the period January 1, 1927, to December 31, 1938;

(7) All stock certificate records containing the stubs of all stock certificates issued, and all cancelled certificates of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and the Consensus Publishing Company.

A copy of said subpoena duces tecum so served upon this defendant is attached to this special plea in bar, marked Exhibit B, and by this reference made a part hereof.

8. On July 18, 1939, this defendant was duly served with a subpoena issued by the District Court of the United States for the Northern District of Illinois, Eastern Division, on July 18, 1939, commanding him to appear before the Grand Jury of said Court at Chicago in the District aforesaid, on July 18, 1939, to testify in behalf of the United States generally, and not depart without leave of the Court or District Attorney. A copy of said subpoena is attached to this special plea in bar, marked Exhibit C and by this reference made a part hereof. Said grand jury for the July term, 1939, was then and there conducting the investigation hereinabove referred to concerning transactions, matters and things claimed to be in violation of the Anti-Trust Laws of the United States, and said subpoenas and subpoena duces tecum were issued and served upon this defendant in connection with and in aid of said investigation.

9. James V. Hayes, George S. Robinson and Sam E. Neel, special assistants to the Attorney General of
426 the United States, were the attorneys for the United

States in charge of conducting said anti-trust investigation then being conducted by and before said grand jury for the July term 1939. Said Hayes, Robinson and Neel were present before the grand jury for the June term 1939, during a substantial part of the proceedings before said grand jury, and while the investigation resulting in the return of the indictment in this cause was in progress and while witnesses called in said inves-

tigation were present and were testifying under oath before said grand jury.

10. Thereafter, pursuant to and in accordance with said subpoenas and subpoena duces tecum, but solely by reason of the compulsion and threat thereof and for no other reason whatsoever, this defendant, on to-wit, the 24th, 25th, 26th, 27th and 28th days of July, 1939, appeared before said grand jury for the July term 1939, and after this defendant had been sworn and had testified concerning his name and address, stated that he had been advised by his attorney that he had a Constitutional privilege against testifying to anything before said Grand Jury that might tend to incriminate him personally; that he had been connected for many years with the Annenberg organization and therefore more or less actively engaged in the business then being investigated; that he wanted it specifically understood that he was asserting his Constitutional privilege against self-incrimination, and refused to answer all questions unless granted immunity from prosecution; that he also wanted it understood that as to each and every question put to him that might tend to incriminate him personally, he would not have to object specifically and his claim of immunity was to apply to all matters about which he might be required to testify before said Grand Jury. Whereupon James V. Hayes stated to this defendant, in substance, in the presence of said grand jury, and to the said grand jury that the 427 attorneys for the United States had decided to grant immunity to this defendant and that this defendant was thereby granted immunity on all matters and questions put to him by or before said grand jury and that such immunity would apply to any and all matters, transactions, and things as to which he might testify.

11. Having been advised by his counsel that by virtue of the aforesaid section of the Anti-Trust laws relating to immunity he was, upon being granted immunity, required by law to testify and to produce evidence, documentary or otherwise, this defendant, on to-wit, the 24th, 25th, 26th, 27th and 28th days of July, 1939, testified at length as a witness on behalf of the United States before said grand jury for the July term, 1939, and answered each and every question put to him by or before said grand jury.

12. In obedience to the command of said subpoenas

and subpoena duces tecum and pursuant to the immunity granted to this defendant, as aforesaid, defendant was required to testify before said grand jury for the July term 1939; and in response to questions put to him before said grand jury, this defendant gave oral testimony before said grand jury concerning, relating to and directly proving the following transactions, matters and things, among others:

(a) The facts and transactions leading up to the organization and incorporation of the defendant Consensus Publishing Company;

(b) The transactions with reference to the capital stock of the defendant Consensus Publishing Company and the ownership of same from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive;

(c) The agreements and employment contracts with reference to commissions and salaries to be paid by Consensus Publishing Company to this defendant, William Molasky, and to Arnold W. Kruse, Lester A. Kruse, Bee Hoffman, James M. Ragen and James M. Ragen, Jr. from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive and the payments of commissions and salaries by the Consensus Publishing Company to the said individuals during said period of time, and the duties performed by each of said individuals for and in behalf of said defendant Consensus Publishing Company during said time;

(d) The expenses of the defendant Consensus Publishing Company including all commissions paid, from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive;

(e) The dividends paid by the defendant Consensus Publishing Company from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive; and concerning and relative to:

(f) The tax returns made by the defendant Consensus Publishing Company from the time of its incorporation to the time this defendant testified before said grand jury including the years 1929 to 1936, both inclusive.

13. In the course of his examination before said grand jury for the July term 1939, particularly with reference to the items enumerated in paragraphs 11 and 12 above, this defendant was compelled to give answers and to produce evidence, relating to and tending to connect him with the allegations of this indictment, and thereby disclosed to said grand jury and the attorneys for the United States information material and relevant to the transactions, matters and things alleged against him in this indictment and each and every count thereof; and to the extent that this defendant may have committed any crime or crimes against the United States as charged in this indictment, or any count thereof, this defendant by his testimony, thus compelled and given before said grand jury for the July term, 1939, as aforesaid, disclosed facts which tend to prove material allegations of said indictment, and each and every count thereof, and which would be necessary links in a chain of evidence to establish the guilt of this defendant thereunder and to incriminate this defendant.

And this defendant avers and submits that under and by virtue of the Constitution and laws of the United States and because of the premises aforesaid, he cannot be prosecuted or subjected to any penalty or forfeiture for or on account of the transactions, matters, and things, or any or either of them, which are in this indictment and each and every count thereof mentioned and charged against this defendant, and all of this said defendant is ready to verify.

Wherefore, defendant, William Molasky, prays judgment that this said indictment against him and each and every count thereof be dismissed and set aside as to him and that he be discharged and go hence without day.

David Baron;

*Attorney for defendant, William
Molasky.*

United States of America, }
 State of Missouri, } ss.
 City of St. Louis.

William Molasky, being first duly sworn, on oath deposes and says that he is one of the defendants to the above numbered indictment; that he has read the foregoing amended special plea in bar in his behalf and knows the contents thereof and that the same is true.

William Molasky.

Subscribed and sworn to before me this 12th day of February, A. D. 1940.

My term expires: Nov. 2, 1941.

Maurice I. Roufa,
Notary Public.

(Seal)

430

EXHIBIT A.

District Court of the United States of America, }
 Northern District of Illinois, } ss.
 Eastern Division.

THE UNITED STATES OF AMERICA —

To the Marshal of the Eastern District of Missouri, Greeting: We command you to summon William Molasky, 1401 Mart Building, St. Louis, Missouri, if found in your District, to be and appear before our Grand Jury of the District Court of the United States for the Northern District of Illinois, Eastern Division, at Chicago, in the District aforesaid, on the 17th day of July, A. D. 1939, at ten o'clock A. M. to testify in behalf of the United States generally, and not depart without leave of the Court or District Attorney. And this you shall in no wise omit under penalty of the law in that case made and provided. And have you then and there this writ.

Witness the Honorable James H. Wilkerson, Judge of the said Court, at Chicago, in said district, this 6th day of July, in the year of our Lord one thousand nine hundred and thirty-nine and of the independence of the United States of America the 164th year.

Hoyt King,
Clerk.

(Seal)

431

EXHIBIT B.

Subpoena Duces Tecum.

DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois.

July Term, 1939.

The President of the United States of America.

To William Molasky,
1401 Mart Building,
12th and Spruce Streets,
St. Louis, Missouri.

You Are Hereby Commanded that laying aside all and singular your business and excuses you be and appear before the Grand Jury of the District Court of the United States for the Northern District of Illinois, in the Federal Building, Room 450, in the City of Chicago, in said District on the 17th day of July, A. D. 1939, at ten o'clock A. M. of said day, and to bring and produce at the time and place aforesaid, the following records in his possession or control:

(1) All records of collections and disbursements of the Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(2) All records of the quantity of racing forms published and distributed by the Consensus Publishing Company from January 1, 1927 to December 31, 1938;

(3) All contracts between William Molasky and the Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(4) All contracts between William Molasky and the following: Pioneer News Service, Inc., The Molasky Company, The Molasky Holding Company, Paul Brown, Clarence L. Owen, Daily Racing Form Publishing Company, R. D. Publishing Company, Louisiana News Company, Inc., Kansas City News Distributors, Inc.;

(5) All records of collections and disbursements during the period of January 1, 1927 to December 31, 1938, of the Pioneer News Service, Inc., including copies of weekly
432 reports of income and disbursements, and all cancelled
checks issued by the Pioneer News Service, Inc., on

a bank account maintained under the name of Central News Service Company;

(6) All cancelled checks issued by William Molasky on his personal bank accounts payable to, or endorsed by, the following individuals or corporations: M. L. Annenberg, Cecelia Investment Company, The Cecelia Company, the Consensus Publishing Company, Arnold W. Kruse, Joseph E. Hafner, Clarence L. Owen, Paul B. Brown, Hal Langan and Joseph Ottenstein, during the period January 1, 1927 to December 31, 1938;

(7) All cancelled checks issued by the said William Molasky payable to or endorsed by the following persons: Sam Fuer, Jack Meyer, Charles Lewis, B. McQuillian and Mr. Jacobs;

(8) All Minute Books containing notes of meetings of stockholders and Boards of Directors of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and Consensus Publishing Company during the period January 1, 1927 to December 31, 1938;

(9) All stock certificate records containing the stubs of all stock certificates issued, and all cancelled certificates of the Louisiana News Company, Inc., Kansas City News Distributors, Inc., and the Consensus Publishing Company.

on behalf of the United States, and not depart the Court without leave thereof or of the District Attorney.

Hereof Fail Not under penalty of what may befall you thereon.

To the Marshal of the Eastern District of Missouri to execute and return in due form of law.

Witness, the Honorable James H. Wilkerson, District Judge of the United States, this 11th day of July, A. D. 1939, and in the 164th year of the Independence of the United States of America.

Hoyt King,

Clerk.

(Seal)

A true copy teste.

Hoyt King, *Clerk.*

July 11th, 1939.

433

EXHIBIT C.

District Court of the United States of America, }
 Northern District of Illinois, } ss:
 Eastern Division.

The President of the United States of America.

To the Marshal of the Eastern District of Missouri—Greeting:

We Command You to Summon
 William Molasky
 2 Aberdeen Place
 St. Louis, Missouri

if found in your District, to be and appear before our Grand Jury of the District Court of the United States for the Northern District of Illinois, Eastern Division, at Chicago, in the District aforesaid, on the 18th day of July, A. D. 1939 at 10:00 o'clock A. M., to testify in behalf of the United States generally, and not depart without leave of the Court or District Attorney. And this you shall in no wise omit under the penalty of the law in that case made and provided. And have you then and there this writ.

Witness the Hon. James H. Wilkerson, Judge of the said Court, at Chicago, in said District, this 18th day of July, in the year of our Lord one thousand nine hundred and thirty-nine and of the independence of the United States of America the 164th year.

Hoyt King,
 Clerk.

(Seal of
 District Court of United States,
 Northern District 1855—
 Illinois.)

434 Endorsed: In the District Court of the United States. * * (Caption—31760) * * Amended Special Plea in Bar of Defendant William Molasky (Immunity Plea).

437 And on, to wit, the 1st day of April, A. D. 1940, <sup>Filed
Apr. 1,
1940.</sup> came the Plaintiff by its attorneys and filed in the Clerk's office of said Court Motion to Dismiss Amended Special Plea in Bar (Immunity Plea) in words and figures following, to wit:

438 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

• • (Caption—31760) • •

**MOTION TO DISMISS AMENDED SPECIAL PLEA
IN BAR OF DEFENDANT WILLIAM MOLASKY
(IMMUNITY PLEA).**

Now comes the United States of America by its attorney, William J. Campbell, United States Attorney for the Northern District of Illinois, and moves this Court to dismiss the Amended Special Plea in Bar filed herein by William Molasky, one of the defendants in the above numbered indictment, and shows the following in support of its Motion:

I.

The prosecution herein exclusively relates to, and is based upon, willful attempts to evade and defeat income taxes due and owing from the Consensus Publishing Company, an Illinois Corporation, to the United States of America, for the calendar years 1933 to 1936, both inclusive, pursuant to the Revenue Laws of the United States. The above numbered indictment was duly returned by the Grand Jury for the Northern District of Illinois, Eastern Division, for the June Term, 1939 extended for the July Term, 1939, and the said indictment charges violations 439 of Section 88, Title 18, United States Code, and Section 145 of Title 26, United States Code. The proceedings and investigations resulting in the return of the said indictment were, and remain, under the direction of the duly appointed and acting United States Attorney for this district.

The proceedings and investigations conducted by the Grand Jury for the July Term, 1939, set out in the Amended Special Plea in Bar filed herein by the defendant William Molasky, and constituting the basis for the

claim of immunity of the said defendant Molasky, were entirely distinct and independent proceedings from the proceedings before the said June Grand Jury, extended as aforesaid, and set out above, and, as appears from the defendant's Amended Special Plea in Bar, the defendant Molasky knew that these proceedings before the said July Grand Jury were conducted by and under the supervision of certain Special Assistants to the Attorney General, namely, James V. Hayes, George S. Robinson, and Sam E. Neel, and were concerned solely with possible violations of the Act of Congress approved July 2, 1890, as amended, commonly known as the Sherman Anti-Trust Law. The proceedings of the said July Grand Jury in no wise whatsoever related to or concerned violations of the Revenue Laws of the United States, or conspiracies based upon such violations, or aiding, abetting, counselling, or assisting in such violations, all of which the defendant Molasky knew, as he admits in his Amended Special Plea in Bar.

II.

The statute set forth in the Amended Special Plea in Bar filed herein (Sec. 32, Title 15, U. S. Code) does not provide for immunity from prosecution for the offenses charged in the indictment, but relates solely to offenses and prosecutions arising under the said Anti-Trust Laws.

III.

The alleged testimony of the defendant Molasky before the said July Grand Jury and the documents which he allegedly produced pursuant to the subpoena of the said July Grand Jury were not, in fact, known to the officers appearing on behalf of the United States in the proceedings and investigations before the said June Grand Jury, nor was any of the testimony allegedly given by the said defendant or the documents allegedly produced by him before the said July Grand Jury made use of in any way in the proceedings before the said June Grand Jury, all of which appears from the affidavit of William J. Campbell, United States Attorney for the Northern District of Illinois, attached hereto as Exhibit "A"; nor does the Amended Special Plea in Bar filed by the said defendant Molasky allege or show that the testimony allegedly given

and documents allegedly produced by him before the said July Grand Jury were known to or used by the said June Grand Jury, or in any way served as a basis for the prosecution herein.

IV.

The Amended Special Plea in Bar filed by the defendant Molasky does not allege or show that this is a prosecution for or on account of any transaction, matter, or thing concerning which he testified or produced evidence, documentary or otherwise, before the said July Grand Jury.

V.

No testimony which the defendant Molasky gave before the said July Grand Jury or documents which he produced before the said July Grand Jury, which are referred to in the said Amended Special Plea in Bar, could form any part of the transactions, matters, or things which are the subject of this indictment within the meaning and intent of the "anti-trust immunity" statute.

VI.

The Amended Special Plea in Bar filed by the defendant Molasky does not allege or show that the testimony or documents, if any, produced and provided by him before the said July Grand Jury, and upon which said Amended Special Plea in Bar is based, furnish any facts or information connecting the defendant Molasky with the willful attempts to evade and defeat the corporate income taxes of the said Consensus Publishing Company, due and owing for the calendar years 1933 to 1936, both inclusive.

VII.

The Amended Special Plea in Bar filed by the defendant Molasky does not allege or show that the testimony or documents, if any, produced and provided by him before the said July Grand Jury, and upon which said Amended Special Plea in Bar is based, furnished any truthful facts or information not theretofore available or in the possession of officers of the United States conducting or participating in the proceedings before the said June Grand Jury.

VIII.

The defendant Molasky could not have acquired immunity on account of the testimony allegedly given and the documents allegedly produced by him before the said July Grand Jury, which testimony and documents are set forth in his Amended Special Plea in Bar and are the basis of his claim of immunity, because it does not appear from 442 the said Plea that any of the said testimony or documents could have been withheld by him in the absence of an immunity statute such as Section 32, Title 15, United States Code, since it does not appear that any of the said testimony and documents had a tendency to incriminate him within the meaning and intent of the Fifth Amendment to the Constitution of the United States, and further, since it appears that the said testimony and documents related to corporate matters and transactions.

IX.

The Amended Special Plea in Bar does not allege or show that the defendant Molasky testified to or produced evidence, documentary or otherwise, before the said July Grand Jury with respect to the income taxes due and owing by the said Consensus Publishing Company for the calendar years 1933 to 1936, both inclusive, or with respect to the defendant Molasky's incriminating knowledge of, or incriminating connection with the willful attempts to evade and defeat the income taxes due and owing by the said Consensus Publishing Company for the calendar years 1933 to 1936, both inclusive.

X.

The Amended Special Plea in Bar filed by the defendant Molasky is uncertain, insufficient, vague and indefinite in that it fails to allege or show any specific question asked, answer given, or document produced, or the substance of any question asked, answer given, or document produced, which would legally serve as a basis for the claim of immunity alleged in the said Amended Special Plea in Bar.

443

XI.

The Amended Special Plea in Bar shows that the defendant Molasky was duly served with a subpoena duces tecum commanding him to appear before the said June Grand Jury which returned the indictment herein (sitting in Room 450 in the Federal Building, Chicago, Illinois) and to produce before the said June Grand Jury on July 17, 1939, certain documents and records. The said Amended Special Plea in Bar further shows that the first time the defendant Molasky appeared before the said July (Anti-Trust) Grand Jury, was July 24, 1939. The said Amended Special Plea in Bar also shows that any pertinent testimony allegedly given by the said defendant Molasky before the said July Grand Jury, was contained in and covered by the documents and records previously subpoenaed as aforesaid by the said June Grand Jury, so that any privilege to withhold any of the said testimony allegedly given before the said July Grand Jury, had been waived.

Wherefore, the United States of America prays that this Court dismiss the Amended Special Plea in Bar filed herein by the defendant Molasky.

William J. Campbell,
 William J. Campbell,
United States Attorney for the North-
ern District of Illinois.

444

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—31755, 60, 62, 65, 66, 67) * *

AFFIDAVIT OF WILLIAM J. CAMPBELL, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS, IN SUPPORT OF THE GOVERNMENT'S MOTIONS TO DISMISS THE SPECIAL PLEAS OF IMMUNITY FILED HEREIN.

State of Illinois, }
 County of Cook. } ss:

William J. Campbell, being duly sworn, says that he is, and at all of the times hereinafter referred to has been, the duly appointed and acting United States Attorney for

the Northern District of Illinois; that he makes this affidavit in connection with the Government's Motions to Dismiss the respective Special Pleas of Immunity filed by certain defendants herein and in opposition to said Pleas of Immunity.

That prior to the time the matters involved in these indictments were referred to the United States Attorney for investigation by a grand jury, certain of the defendants herein, to wit, Moses L. Annenberg, Walter H. Annenberg, Arnold W. Kruse, Joseph E. Hafner, James M. Ragen, Sr., James M. Ragen, Jr., and L. Stanley Kahn, at their joint request, appeared before the Attorney General of the United States in the Department of Justice at Washington, D. C., in a conference for the purpose of discussing said matters before they were referred to the United States Attorney for the Northern District of Illinois for investigation by a grand jury; that in said conference the defendant Moses L. Annenberg and his attorneys, in the presence of the rest of said defendants attending said conference, and with their apparent consent and acquiescence, asserted to the representatives of the Attorney General that the said Moses L. Annenberg and his business associates would cooperate with the Government in every way in the matter of said investigation and would voluntarily deliver to the appropriate officials and agencies of the Government all of the books and records of the said Moses L. Annenberg and his various corporations and business enterprises which might be considered relevant to the prospective inquiry with respect to violations of the Internal Revenue Laws of the United States by these persons.

That the matter of a grand jury investigation of possible violations of the Internal Revenue Laws of the United States by Moses L. Annenberg and others was referred to the office of the United States Attorney for the Northern District of Illinois by the Attorney General of the United States in May of 1939 for presentation to and investigation by a grand jury; that he immediately proceeded in the preparation of this matter for presentation to the June 1939 Grand Jury, causing grand jury subpoenas and subpoenas duces tecum to be issued to various of the defendants herein and others who were officers or business associates of the said Moses L. Annenberg in his varied and manifold business enterprises; that said subpoenas duces

tecum s; issued called for the following records for the 446 period from January 1, 1927, to December 31, 1938, inclusive:

- (1) All Cash Receipts and Disbursements Books; (2) All Journals; (3) All General Ledgers and other Ledgers; (4) All Daily Cash Receipt Books; (5) Charter, all By-Laws and all Minute Books; (6) All Stock Certificate Books and cancelled stock certificates; (7) All cancelled checks, check stubs, bank deposit slips, bank books and bank statements; (8) All Vouchers; (9) All Financial Reports and financial statements of receipts and disbursements from business; (10) All other books and records of account; (11) All Work Papers used in connection with the preparation of tax returns, and all retained copies of tax returns; (12) All Correspondence;

and that said subpoenas specifically calling for the books, records and documents hereinabove described were issued to and served upon the following corporations and individuals as officers thereof, respectively:

Regal Press, Inc., and Joseph E. Hafner, Secretary;

The Cecelia Company and Arnold W. Kruse, Secretary;

Telegraph Building Corporation and Joseph E. Hafner, Secretary;

M. L. Annenberg Company and Joseph E. Hafner, Treasurer;

General News Bureau, Incorporated, and James M. Ragen, Sr., President;

Illinois Nationwide News Service, Incorporated, and James M. Ragen, Sr., President;

M. L. A. Investment Company and Joseph E. Hafner, Secretary;

Form Building Corporation and Joseph E. Hafner, Secretary;

A. B. & M. Corporation and Herbert S. Kamin, Treasurer;

Nationwide News Service, Incorporated, and James M. Ragen, Sr., President;

The McMurray Publishing Company, Ltd., and Arnold W. Kruse, President;

City News Company, Ltd., and Joseph E. Hafner, Treasurer;

Triangle Press, Inc., and Arnold W. Kruse, Treasurer;

Walter Holding Corporation and Arnold W. Kruse, President;

Crater Realty and Finance Corporation and Arnold W. Kruse, Assistant Treasurer;

447 Montreal News Dealers Supply Company, Ltd., and Joseph E. Hafner, Treasurer;

Nationwide News Service of Canada, Ltd., and James M. Ragen, Sr., President;

Aeme News Agency, Ltd., and Joseph E. Hafner, Vice President;

Morning Telegraph, Incorporated, and Herbert S. Kamin, Assistant Secretary;

Wentworth News Agency, Ltd., and Herbert S. Kamin, Secretary;

Milwaukee News Co. and Aaron Trosch, Treasurer;

Bentley Murray & Company and Charles W. Bidwill, President;

R. D. Publishing Company, Inc. (Delaware), and Joseph E. Hafner, an officer;

R. D. Publishing Company (Illinois), and Joseph E. Hafner, Vice President;

Universal Publishing Company and Harry Friedman, President;

Min-Half Distributing Corporation and Joseph E. Hafner, President;

Consensus Publishing Company and James M. Ragen, Jr., Vice President;

and that, in addition, the books, records and documents of the unincorporated businesses of the R. D. Publishing companies in New Orleans, Los Angeles, and San Francisco were also produced in response to the foregoing subpoenas; that subpoenas duces tecum were also issued to and served upon Regal Press, Inc., and the following officers thereof:

Arnold W. Kruse, President,
 John O'Donnell, Vice President,
 Joseph E. Hafner, Secretary,
 and
 Herbert S. Kamin, Assistant Treasurer,

to bring and produce before the said June 1939 Grand Jury the books, records and documents of the nature hereinbefore described in their possession, custody and control, for the period from January 1, 1927, to December 31, 1938, belonging or relating to the business affairs and in-

448 come tax matters of Moses L. Annenberg, Walter H. Annenberg, and Sadie C. Annenberg, wife of the said Moses L. Annenberg.

Thereafter, but several weeks before the July 1939

Grand Jury was empaneled and sworn, the said defendants herein who have filed said Special Pleas of Immunity, and who were subpoenaed as aforesaid, produced all records described in and called for by said subpoenas, which they acknowledged possession or knowledge of, to the quarters occupied by the United States Attorney in the United States Court House at Chicago, Illinois, for use by the said June 1939 Grand Jury, and in producing and delivering said documents and records the said defendants, by their attorneys, in a conference held in the office of the United States Attorney, indicated that they would comply voluntarily with the subpoenas and that said records were being voluntarily presented under said subpoenas for the use of the June 1939 Grand Jury in its said income tax investigation without any objections or reservations whatsoever and they arranged with their accountants for the orderly production of the said records as aforesaid. That said records were retained and used by this grand jury throughout its existence, and upon its discharge, after the return of these indictments, these records were impounded by a written order of this Court duly entered.

That all of the defendants herein who appeared before the July Term 1939 Grand Jury and who have claimed immunity by virtue of their appearance before the said July Grand Jury had previously appeared before the said June Grand Jury and there testified and identified all of the documents produced by themselves and certain other witnesses under the subpoenas duces tecum hereinbefore described. The said subpoenas of the said June Grand

Jury directed the production before that body of the 449 pertinent books, records, and documents upon which the above numbered indictments are based. Inasmuch as each of the defendants purported to comply with the said subpoenas of the said June Grand Jury, each of them must have delivered to the said June Grand Jury the pertinent books, records and documents and, accordingly, could not have given to the said July Grand Jury the said books, records, and documents for the calendar years involved in the said indictments.

That the July Term Grand Jury confined its work and deliberations exclusively to the investigation of possible violations of the Sherman Anti-Trust Law by the said Moses L. Annenberg and others, which investigation, by its nature and purpose, involved issues entirely different and unrelated to the offenses considered by the said June

Grand Jury and therefore would necessarily require, and was intended to require, testimony and evidence of a character independent of and unrelated to the facts and charges upon which the indictments returned by the June Grand Jury were founded. That the said anti-trust investigation by the July Grand Jury was conducted by duly appointed representatives of the Attorney General, James V. Hayes, George S. Robinson, and Sam E. Neel, who, after the July Grand Jury had been empaneled, devoted their time and efforts exclusively to that investigation.

That since the July Term Grand Jury concluded its investigation of anti-trust violations and was discharged, this affiant has learned that all of the records, documents, and papers, if any, produced before the July Term Grand Jury by any of the defendants herein were returned to them, and this affiant states of his own knowledge that 450 none of the records, documents or papers so produced

before the July Term Grand Jury and none of the testimony of any witness before the July Term Grand Jury was brought to the knowledge of or used by the June Term Grand Jury and the officers and representatives of the Government prosecuting the inquiries before that Grand Jury.

That the fact that the defendants involved in these pleas of immunity first gave their testimony and produced their documents before the said June Grand Jury, when each of them at all times possessed the right to assert his privilege against self-incrimination, coupled with the fact, which your affiant here asserts to be a fact, that none of the testimony, if any, given, or additional documents, if any, produced, by the said defendants before the said July Grand Jury was used by the said June Grand Jury in any manner or served in any manner as a basis for the indictments involved herein, removes any possibility that any of the said defendants could have believed he had been purged of any criminality other than under the so-called "Sherman anti-trust law" by anything that occurred before the said July Grand Jury.

Further, your affiant sayeth not.

(Sgd.) William J. Campbell.

Subscribed and sworn to before me this 29th day of March, A. D. 1940.

(Seal)

E. L. Barker,
Notary Public.

451 And afterwards, to wit, on the 1st day of April A. D. 1940, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge appears the following entry, to wit: Entered
Apr. 1,
1940.

452 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

ORDER.

This matter having come on to be heard upon the motions of the defendants for leave to file instanter demurrers to the indictment herein nunc pro tunc as of January 5, 1940, and the court being fully advised in the premises,

It Is Hereby Ordered that leave be, and the same hereby is, given to the defendants and each of them to file instanter demurrers to the indictment herein nunc pro tunc as of January 5, 1940.

Enter:

James H. Wilkerson,
*Judge of United States District
Court, for the Northern Dis-
trict of Illinois.*

Dated April 1st 1940.

642 And afterwards, to wit, on the 1st day of April A. D. 1940, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge appears the following entry, to wit: Entered
Apr. 1,
1940.

643 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

Monday April 1, A. D. 1940.

Present: Honorable James H. Wilkerson, Judge.

This day comes the United States by the United States Attorney come also the defendants by their attorneys and thereupon this cause coming on to be heard on the defendants pleas of immunity and the motion of the United States

Attorney to dismiss said pleas the Court having heard the arguments of counsel in part it is ordered this cause be and the same is hereby continued for further hearing April 2, A. D. 1940.

Filed
Apr. 1,
1940
(Nunc
pro tunc
as of
Jan. 5,
1940).

453 And on, to wit, the 1st day of April A. D. 1940 nunc pro tunc as of January 5, 1940, came the defendants by their attorneys and filed in the Clerk's office of said Court certain Demurrers in words and figures following, to wit:

454 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—31760) * *

DEMURRER.

Come now the defendants Arnold W. Kruse and Lester A. Kruse, by their attorneys, and say that said indictment and the matters therein contained, in the manner and form as the same are therein alleged and set forth, are fatally insufficient and defective in substance and in form, and are insufficient in law to require these defendants to plead to said indictment or to answer the same, and are insufficient to sustain a judgment against these defendants in that said indictment, and each count thereof, fails to aver or set forth any facts or allege or charge the commission of any acts by these defendants constituting an offense against the United States of America or the laws thereof, and in that said indictment and each count thereof fails to aver or set forth the necessary elements of the offenses sought to be charged; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demur further to said indictment and move to quash and dismiss the same upon the following grounds:

1. Said indictment and each count thereof is duplicitous in that several separate and distinct offenses are charged or attempted to be charged in each of said counts, that is to say:

455 (1) The first, second, third and fourth counts and each of them charge or attempt to charge these defendants with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge these defend-

ants with having committed another separate and distinct criminal offense, that is, the filing of a false income tax return.

(2) The first, second, third and fourth counts and each of them charge or attempt to charge these defendants with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge these defendants with having committed another separate and distinct criminal offense, that is, the willful failure to pay a tax.

(3) The first, second, third and fourth counts and each of them charge or attempt to charge these defendants with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge these defendants with having committed another separate and distinct criminal offense, that is, the willful failure to pay over a tax.

(4) The first, second, third and fourth counts and each of them charge or attempt to charge these defendants with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge these defendants with having committed another separate and distinct criminal offense, that is, the willful failure to make a return as to certain alleged income.

(5) The fifth count charges or attempts to charge these defendants with having participated in several separate, independent, disconnected, and unrelated conspiracies, that is to say, it charges or attempts to charge these defendants with having conspired to willfully attempt to evade and defeat income taxes for eight separate and distinct calendar years.

(6) The fifth count charges or attempts to charge these defendants with conspiracy to willfully attempt to evade and defeat income taxes and also with numerous other separate and distinct conspiracies or other separate and distinct offenses, that is to say:

(a) It charges or attempts to charge these defendants with deceiving "such Internal Revenue officers and employees of the United States as should be charged with the assessment and collection of such taxes, and such officers and employees of the United States as should be authorized and required to examine and audit the account books and records of said corporation in checking and verifying its Internal Revenue tax returns on account of its income taxes

for the said calendar years 1929 to 1936, both dates inclusive, to be filed with the Collector of Internal Revenue for said Collection District, as required by law."

(b) It also charges or attempts to charge these defendants with preparing the way "for making false and fraudulent returns to said Collector for said calendar years."

(c) It also charges or attempts to charge that said "false and fraudulent returns" show "greatly less income taxes due from said corporation for said calendar years."

457 (d) It also charges or attempts to charge these defendants with preparing the way "for failing to pay to said Collector, in accordance with such false and fraudulent returns, the true and correct taxes on the net income of said corporation."

(e) It also charges or attempts to charge that the defendants would cause the said corporation "not to pay the true and correct income taxes for said corporation on account of its business for the said calendar years."

(f) It also charges or attempts to charge these defendants with claiming fraudulent and false deductions from the gross income of said corporation.

(g) It also charges or attempts to charge that these fraudulent and false deductions "were consequently to show the taxable net income of said corporation in carrying on its said business during said respective calendar years less by said amounts than it actually was."

(h) It also charges or attempts to charge these defendants with using false "Employment Contracts" as "a mere sham, device and pretense to evade and defeat the payment of income taxes due and to become due from said corporation to the United States of America."

(i) It also charges or attempts to charge these defendants with concealing the true income of the said corporation.

2. Said indictment and each count thereof is so vague, indefinite, and uncertain as not fully to inform these defendants as to the nature and cause of the accusations against them, and is so lacking in explanation and particularization that it fails to give these defendants sufficient information of the charges against them so as to enable
458 them to prepare their defense thereto and to plead an acquittal or conviction thereunder in bar to any other proceeding against them based upon some matter or thing, or on any of them, on which said indictment and each count

thereof is based, as required by Article VI of the Amendments to the Constitution of the United States. Said indictment and each count thereof is vague, indefinite and uncertain in the following matters:

(1) The first, second, third and fourth counts, and each of them does not allege what acts, if any, were done by any of these defendants.

(2) The fifth count alleges acts done by "the said defendants," without specifying which of said acts are alleged to have been done by the individual defendants and which by the corporate defendant.

(3) The fifth count alleges that the said defendants would and did "cause the said corporation, through themselves, the defendants, and divers other persons, as officers, agents and directors of said corporation, to enter into and agree upon certain so-called 'Employment Contracts' by and between the corporation and divers of the defendants, by virtue of the terms of which said 'Employment Contracts' the corporation would be and was caused to contract for and engage the services of divers of the defendants in an executive capacity and whereby the corporation would, and did, agree to pay the said defendants large percentages of the net profits of the corporation as commissions, wages and salaries," without specifying the identity of said "divers other persons," and without specifying the terms of the alleged "Employment Contracts," and without specifying the acts and time and place of said acts alleged to have been committed by these defendants and those alleged to have been committed by said "divers other persons."

(4) The fifth count contains amounts for the calendar years 1929-1936, inclusive, entitled "sums paid under 'Employment Contracts,'" without designating which of these defendants are alleged to have been the recipients, and the amount alleged to have been received by each.

(5) The fifth count alleges that the defendants caused to be shown on the books of the said corporation "the said so-called 'Employment Contracts,' and payments of money thereunder, whereby and by virtue of which it would be and was made to appear that for each of the said respective calendar years as aforesaid, large sums of money had been due and were paid by the said corporation to the said defendants as commissions and salary for services rendered in an executive capacity to said corporation for each of the said respective calendar years," without specifying

how the said corporate defendant, The Consensus Publishing Company, could be the recipient of money paid by itself to itself "as commissions and salary for services rendered in an executive capacity" to itself.

(6) The fifth count alleges that "the said defendants would cause it not to pay the true and correct income taxes for said corporation on account of its business for the said calendar years," without specifying whether said acts are claimed to have been committed by the individual defendants or by the corporate defendant, and without specifying the time and place of said alleged acts.

Wherefore, these defendants pray judgment that this demurrer be sustained as to them; that said indictment 460 be quashed and that they be dismissed and discharged of this indictment by the court.

sgd. Miller, Gorham, Wescott & Adams,

sgd. James B. Wescott,

sgd. Edward R. Adams,

sgd. Robert W. Wales,

*Attorneys for Defendants Arnold W.
Kruse and Lester A. Kruse.*

461 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

DEMURRER.

Comes now the defendant, William Molasky, by his attorney, and says that said indictment and the matters therein contained, in the manner and form as the same are therein alleged and set forth, are fatally insufficient and defective in substance and in form, and are insufficient in law to require this defendant to plead to said indictment or to answer the same, and are insufficient to sustain a judgment against this defendant in that said indictment and each count thereof fails to aver or set forth any facts or allege or charge the commission of any acts by this defendant constituting an offense against the United States of America or the laws thereof, and in that said indictment and each count thereof fails to aver or set forth the necessary elements of the offenses sought to be charged; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific

causes, demurs further to said indictment and moves to quash and dismiss the same upon the following grounds:

1. Said indictment and each count thereof is duplicitous in that several separate and distinct offenses are charged or attempted to be charged in each of said counts, that is to say:

(1) The first, second, third and fourth counts and each of them charge or attempt to charge this defendant 462 with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge this defendant with having committed another separate and distinct criminal offense, that is, the filing of a false income tax return.

(2) The first, second, third and fourth counts and each of them charge or attempt to charge this defendant with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge this defendant with having committed another separate and distinct criminal offense, that is, the willful failure to pay a tax.

(3) The first, second, third and fourth counts and each of them charge or attempt to charge this defendant with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge this defendant with having committed another separate and distinct criminal offense, that is, the willful failure to pay over a tax.

(4) The first, second, third and fourth counts and each of them charge or attempt to charge this defendant with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge this defendant with having committed another separate and distinct criminal offense, that is, the willful failure to make a return as to certain alleged income.

(5) The fifth count charges or attempts to charge this defendant with having participated in several, separate, independent, disconnected, and unrelated conspiracies, that is to say, it charges or attempts to charge this defendant with having conspired to willfully attempt to evade and defeat income taxes for eight separate and distinct 463 calendar years.

(6) The fifth count charges or attempts to charge this defendant with conspiracy to willfully attempt to evade and defeat income taxes and also with numerous

other separate and distinct conspiracies or other separate and distinct offenses, that is to say:

(a) It charges or attempts to charge this defendant with deceiving "such Internal Revenue officers and employees of the United States as should be charged with the assessment and collection of such taxes, and such officers and employees of the United States as should be authorized and required to examine and audit the account books and records of said corporation in checking and verifying its Internal Revenue tax returns on account of its income taxes for the said calendar years 1929 to 1936, both dates inclusive, to be filed with the Collector of Internal Revenue for said Collection District, as required by law."

(b) It also charges or attempts to charge this defendant with preparing the way "for making false and fraudulent returns to said Collector for said calendar years."

(c) It also charges or attempts to charge that said "false and fraudulent returns" show "greatly less income taxes due from said corporation for said calendar years."

(d) It also charges or attempts to charge this defendant with preparing the way "for failing to pay to said Collector, in accordance with such false and fraudulent returns, the true and correct taxes on the net income of said corporation."

(e) It also charges or attempts to charge that this defendant would cause the said corporation "not to pay the true and correct income taxes for said corporation on account of its business for the said calendar years."

464 (f) It also charges or attempts to charge this defendant with claiming fraudulent and false deductions from the gross income of said corporation.

(g) It also charges or attempts to charge that these fraudulent and false deductions "were consequently to show the taxable net income of said corporation in carrying on its said business during said respective calendar years less by said amounts than it actually was."

(h) It also charges or attempts to charge this defendant with using false "Employment Contracts" as "a mere sham, device and pretense to evade and defeat the payment of income taxes due and to become due from said corporation to the United States of America."

(i) It also charges or attempts to charge this defendant with concealing the true income of the said corporation.

2. Said indictment and each count thereof is so vague,

indefinite, and uncertain as not fully to inform this defendant as to the nature and cause of the accusations against him, and is so lacking in explanation and particularization that it fails to give this defendant sufficient information of the charges against him so as to enable him to prepare his defense thereto and to plead an acquittal or conviction thereunder in bar to any other proceeding against him based upon some matter or thing, or on any of them, on which said indictment and each count thereof is based, as required by Article VI of the Amendments to the Constitution of the United States. Said indictment and each count thereof is vague, indefinite and uncertain in the following matters:

(1) The first, second, third and fourth counts and each of them do not allege what acts, if any, were done by this defendant.

465 (2) The fifth count alleges acts done by "the said defendants," without specifying which of said acts are alleged to have been done by the individual defendants, including this defendant, and which by the corporate defendant.

(3) The fifth count alleges that the said defendants would and did "cause the said corporation, through themselves, the defendants, and divers other persons, as officers, agents and directors of said corporation, to enter into and agree upon certain so-called 'Employment Contracts' by and between the corporation and divers of the defendants, by virtue of the terms of which said 'Employment Contracts' the corporation would be and was caused to contract for and engage the services of divers of the defendants in an executive capacity and whereby the corporation would, and did, agree to pay the said defendants large percentages of the net profits of the corporation as commissions, wages and salaries," without specifying the identity of said "divers other persons," and without specifying the terms of the alleged "Employment Contracts," and without specifying the acts and time and place of said acts alleged to have been committed by these defendants, including this defendant, and those alleged to have been committed by said "divers other persons."

(4) The fifth count contains amounts for the calendar years 1929-1936, inclusive, entitled "sums paid under 'Employment Contracts,'" without designating which of these defendants, including this defendant, are alleged to have

been the recipients, and the amount alleged to have been received by each, including this defendant.

(5) The fifth count alleges that the defendants caused to be shown on the books of the said corporation "the said co-called 'Employment Contracts,' and payments of money thereunder, whereby and by virtue of which 466 it would be and was made to appear that for each of the said respective calendar years as aforesaid, large sums of money had been due and were paid by the said corporation to the said defendants as commissions and salary for services rendered in an executive capacity to said corporation for each of the said respective calendar years," without specifying how the said corporate defendant, The Consensus Publishing Company, could be the recipient of money paid by itself to itself "as commissions and salary for services rendered in an executive capacity" to itself.

(6) The fifth count alleges that "the said defendants would cause it not to pay the true and correct income taxes for said corporation on account of its business for the said calendar years," without specifying whether said acts are claimed to have been committed by the individual defendants, including this defendant, or by the corporate defendant, and without specifying the time and place of said alleged acts.

Wherefore, this defendant prays judgment that this demurrer be sustained as to him; that said indictment be quashed and that he be dismissed and discharged of this indictment by the court.

David Baron,
Attorney for Defendant, William Molasky.

467 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

DEMURRER.

Come now the defendants, Moses L. Annenberg, Jules Taylor, James M. Ragen, James M. Ragen, Jr., Herbert S. Kamin and The Consensus Publishing Company, an Illinois corporation, by their attorneys, and say that said indictment and the matters therein contained, in the manner and form as the same are therein alleged and set forth, are fatally insufficient and defective in substance and in form, and are insufficient in law to require these defendants to plead to said indictment or to answer the same, and are

insufficient to sustain a judgment against these defendants in that said indictment and each count thereof fails to aver or set forth any facts or allege or charge the commission of any acts by these defendants constituting an offense against the United States of America or the laws thereof, and in that said indictment and each count thereof fails to aver or set forth the necessary elements of the offenses sought to be charged; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demur further to said indictment and move to quash and dismiss the same upon the following grounds:

468 1. Said indictment and each count thereof is duplicious in that several separate and distinct offenses are charged or attempted to be charged in each of said counts, that is to say:

(1) The first, second, third and fourth counts and each of them charge or attempt to charge these defendants with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge these defendants with having committed another separate and distinct criminal offense, that is, the filing of a false income tax return.

(2) The first, second, third and fourth counts and each of them charge or attempt to charge these defendants with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge these defendants with having committed another separate and distinct criminal offense, that is, the willful failure to pay a tax.

(3) The first, second, third and fourth counts and each of them charge or attempt to charge these defendants with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge these defendants with having committed another separate and distinct criminal offense, that is, the willful failure to pay over a tax.

(4) The first, second, third and fourth counts and each of them charge or attempt to charge these defendants with having committed a criminal offense, that is, a willful attempt to evade and defeat a tax, and each of said counts also charge or attempt to charge these defendants with
469 having committed another separate and distinct criminal offense, that is, the willful failure to make a return as to certain alleged income.

(5) The fifth count charges or attempts to charge these defendants with having participated in several, separate, independent, disconnected, and unrelated conspiracies, that is to say, it charges at attempts to charge these defendants with having conspired to wilfully attempt to evade and defeat income taxes for eight separate and distinct calendar years.

(6) The fifth count charges or attempts to charge these defendants with conspiracy to wilfully attempt to evade and defeat income taxes and also with numerous other separate and distinct conspiracies or other separate and distinct offenses, that is to say:

(a) It charges or attempts to charge these defendants with deceiving "such Internal Revenue officers and employees of the United States as should be charged with the assessment and collection of such taxes, and such officers and employees of the United States as should be authorized and required to examine and audit the account books and records of said corporation in checking and verifying its Internal Revenue tax returns on account of its income taxes for the said calendar years 1929 to 1936, both dates inclusive, to be filed with the Collector of Internal Revenue for said Collection District, as required by law."

(b) It also charges or attempts to charge these defendants with preparing the way "for making false and fraudulent returns to said Collector for said calendar years."

470 (c) It also charges or attempts to charge that said "false and fraudulent returns" show "greatly less income taxes due from said corporation for said calendar years."

(d) It also charges or attempts to charge these defendants with preparing the way "for failing to pay to said Collector, in accordance with such false and fraudulent returns, the true and correct taxes on the net income of said corporation."

(e) It also charges or attempts to charge that these defendants would cause the said corporation "not to pay the true and correct income taxes for said corporation on account of its business for the said calendar years."

(f) It also charges or attempts to charge these defendants with claiming fraudulent and false deductions from the gross income of said corporation.

(g) It also charges or attempts to charge that these fraudulent and false deductions "were consequently to show the taxable net income of said corporation in carrying

on its said business during said respective calendar years less by said amounts than it actually was."

(h) It also charges or attempts to charge these defendants with using false "Employment Contracts" as "a mere sham, device and pretense to evade and defeat the payment of income taxes due and to become due from said corporation to the United States of America."

(i) It also charges or attempts to charge these defendants with concealing the true income of the said corporation.

2. Said indictment and each count thereof is so vague, indefinite, and uncertain as not fully to inform these defendants as to the nature and cause of the accusations against them, and is so lacking in explanation and particularization that it fails to give these defendants sufficient information of the charges against them so as to enable them to prepare their defense thereto and to plead an acquittal or conviction thereunder in bar to any other proceeding against them based upon some matter or thing, or on any of them, on which said indictment and each count thereof is based, as required by Article VI of the Amendments to the Constitution of the United States. Said indictment and each count thereof is vague, indefinite and uncertain in the following matters:

(1) The first, second, third and fourth counts and each of them do not allege what acts, if any, were done by any of these defendants.

(2) The fifth count alleges acts done by "the said defendants," without specifying which of said acts are alleged to have been done by the individual defendants and which by the corporate defendants.

(3) The fifth count alleges that the said defendants would and did "cause the said corporation, through themselves, the defendants, and divers other persons, as officers, agents and directors of said corporation, to enter into and agree upon certain so-called 'Employment Contracts' by and between the corporation and divers of the defendants, by virtue of the terms of which said 'Employment Contracts' the corporation would be and was caused to contract for and engage the services of divers of the defendants in an executive capacity and whereby the corporation would, and did, agree to pay the said defendants large percentages of the net profits of the corporation as commissions, wages and salaries," without specifying the identity of said "divers other persons," and without spe-

cifying the terms of the alleged "Employment Contracts," and without specifying the acts and time and place of said acts alleged to have been committed by these defendants and those alleged to have been committed by said "divers other persons."

(4) The fifth count contains amounts for the calendar years 1929-1936, inclusive, entitled "sums paid under 'Employment Contracts,' " without designating which of these defendants are alleged to have been the recipients, and the amount alleged to have been received by each.

(5) The fifth count alleges that the defendants causes to be shown on the books of the said corporation "the said so-called 'Employment Contracts,' and payments of money thereunder, whereby and by virtue of which it would be and was made to appear that for each of the said respective calendar years as aforesaid, large sums of money had been due and were paid by the said corporation to the said defendants as commissions and salary for services rendered in an executive capacity to said corporation for each of the said respective calendar years," without specifying how the said corporate defendant, The Consensus Publishing Company, could be the recipient of money paid by itself to itself "as commissions and salary for services rendered in an executive capacity" to itself.

(6) The fifth count alleges that "the said defendants would cause it not to pay the true and correct income taxes for said corporation on account of its business for the said calendar years," without specifying whether said acts 473 are claimed to have been committed by the individual defendants or by the corporate defendant, and without specifying the time and place of said alleged acts.

Wherefore, these defendants pray judgment that this demurrer be sustained as to them; that said indictment be quashed and that they be dismissed and discharged of this indictment by the court.

(sgd) Weymouth Kirkland,

(sgd) Jay Fred Reeves,

(sgd) Kirkland, Fleming, Green, Martin & Ellis,
Attorneys for Defendants, Moses L. Annenberg, Jules Taylor, James A. Ragen, James A. Ragen, Jr., Herbert S. Kamin and The Consensus Publishing Company, an Illinois corporation.

644 And afterwards, to wit, on the 2nd day of April, A. D. 1940, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

Entered
Apr. 2,
1940.

645 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—31760) * *

Tuesday, April 2, A. D. 1940.

Present: Honorable James H. Wilkerson, Judge.

This day again comes the United States by the United States attorney come also the defendants by their attorneys and thereupon this cause coming on further to be heard on the defendants pleas of immunity and the motion of the United States Attorney to dismiss said pleas the Court having heard the arguments of counsel in part it is ordered this cause be and the same is hereby continued for further hearing to April 3, A. D. 1940.

646 And afterwards, to wit, on the 3rd day of April, A. D. 1940, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appear the following entries to wit:

Entered
Apr. 3,
1940.

647 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—31760) * *

Wednesday, April 3, A. D. 1940.

Present: Honorable James H. Wilkerson, Judge.

This day comes the United States by the United States Attorney come also the defendants by their attorneys and thereupon this cause coming on to be heard upon the defendants' demurrers to the indictment filed herein against them and the Court having heard the arguments of counsel it is ordered this cause be and the same is hereby continued for disposition April 10, A. D. 1940.

Entered 648 IN THE DISTRICT COURT OF THE UNITED STATES.
Apr. 3,
1940. * * (Caption—31760) * *

Wednesday, April 3, A. D. 1940.

Present: Honorable James H. Wilkerson, Judge.

This day comes the United States by the United States Attorney comes also the defendant William Molasky by his attorney and thereupon this cause coming on to be heard upon the defendants amended plea in bar and the motion of the United States to dismiss said plea and the Court having heard the arguments of counsel it is ordered this cause be and the same is hereby continued for disposition April 10, A. D. 1940.

Entered 649 IN THE DISTRICT COURT OF THE UNITED STATES.
Apr. 3,
1940. * * (Caption—31760) * *

Wednesday, April 3, A. D. 1940.

Present: Honorable James H. Wilkerson, Judge.

This day again comes the United States by the United States Attorney come also the defendants by their attorneys and thereupon this cause coming on further to be heard on the defendants pleas of immunity and the motion of the United States attorney to dismiss said pleas and the Court having heard the arguments of counsel it is ordered this cause be and the same is hereby continued for disposition to April 10, A. D. 1940.

474 And afterwards, to wit, on the 11th day of April, A. D. 1940, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

475 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

Entered
Apr. 11,
1940.

• • (Caption—31760) • •

ORDER.

This cause having come on to be heard upon the demurrer filed by each of the defendants to the indictment herein, and the Court having read and fully considered the said demurrers, as well as the briefs filed by counsel for the defendants in support thereof and by counsel for the Government in opposition thereto, and having heard the arguments of counsel, and being fully advised in the premises,

It Is Hereby Ordered that each of the said demurrers be, and the same is, hereby overruled.

Enter:

James H. Wilkerson,
Judge.

Dated at Chicago, Illinois this 11th day of April, A. D. 1940.

476 And afterwards, to wit, on the 11th day of April, A. D. 1940, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

Entered
Apr. 11,
1940.

477 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

ORDER.

This matter having come on to be heard upon a certain Special Plea in Bar seeking immunity, filed by defendant James M. Ragen, Jr., and an amended Special Plea in Bar seeking immunity filed by defendant William Molasky in the above entitled cause, and upon the Government's Motions to Dismiss the said Pleas, and the Court having read and fully considered the said Pleas and the Government's

Motions to Dismiss the same (without giving consideration to the affidavit attached thereto), as well as the briefs filed by counsel for the defendants and counsel for the Government, and having heard the arguments of counsel, and being fully advised in the premises,

It Is Hereby Ordered that the Government's Motions to Dismiss the Pleas claiming immanity, filed herein by defendants James M. Ragen, Jr., and William Molasky, be, and the same are, hereby sustained, and the said Special Pleas, and each of them, are hereby dismissed.

Enter:

James H. Wilkerson,
Judge.

Dated at Chicago, Illinois this 11th day of April, A. D. 1940.

478 To which order and each portion thereof, the above named defendants, and each of them, except. Said defendants are hereby allowed ninety days for the filing of a bill of exceptions.

Enter:

James H. Wilkerson,
Judge.

479 And afterwards, to wit, on the 23rd day of April, A. D. 1940, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

480 IN THE DISTRICT COURT OF THE UNITED STATES

Entered
Apr. 23,
1940.

For the Northern District of Illinois,
Eastern Division.

Tuesday, April 23, A. D. 1940.

Present: Honorable James H. Wilkerson, Judge.

United States of America

vs.

Moses L. Annenberg, William Molasky, Jules Taylor, Arnold W. Kruse, Lester A. Kruse, James M. Ragen, Sr., James M. Ragen, Jr., Herbert S. Kamin, and The Consensus Publishing Company, an Illinois Corporation. } No. 31760.

Comes the United States by the United States Attorney come also the defendants Moses L. Annenberg, William Molasky, Jules Taylor, Arnold W. Kruse, Lester A. Kruse, James M. Ragen, Sr., James M. Ragen, Jr., and Herbert S. Kamin in their own proper persons, comes also the defendant The Consensus Publishing Company, an Illinois Corporation by its attorney and being arraigned upon the indictment filed herein against them each defendant pleads not guilty thereto and

It Is Ordered this cause be and the same is hereby continued to May 23, A. D. 1940 for trial.

481 And on, to wit, the 23rd day of May, A. D. 1940, came the defendants by their attorneys and filed in the Clerk's office of said Court certain Motion and Affidavit in words and figures following, to wit:

Filed 482 IN THE DISTRICT COURT OF THE UNITED STATES.
 May 23, 1940. • • (Caption—31760) • •

MOTION.

Now comes James M. Ragen and James M. Ragen, Jr., defendants, by John F. Tyrrell, their attorney, and moves

(1) For leave to withdraw the pleas of not guilty heretofore entered herein on behalf of each of said defendants and to set aside the order overruling the demurrer heretofore filed herein on their behalf, reinstating said demurrer for hearing, and to file written memorandum in support of the demurrer heretofore filed within twenty (20) days, and

(2) In the event the demurrer should be overruled, that the date of the trial be set after October 1st, 1940.

The affidavit of John F. Tyrrell attached hereto is respectfully submitted in support of this motion.

(Sgd) John F. Tyrrell,
*Attorney for Defendants, James
 M. Ragen and James M. Ra-
 gen, Jr.*

483 IN THE DISTRICT COURT OF THE UNITED STATES.
 • • (Caption—31760) • •

AFFIDAVIT OF JOHN F. TYRRELL.

State of Illinois, }
 County of Cook. } ss.

John F. Tyrrell, being first duly sworn, deposes and says:

1. That he is the attorney for James M. Ragen and James M. Ragen, Jr., impleaded as defendants in the above indictment. That this affiant was retained as counsel by said defendants on April 22nd, 1940, and that prior to said date said defendants had been represented by the law firm of Kirkland, Fleming, Green, Martin & Ellis.

2. That the said James M. Ragen, Sr. and James M. Ragen, Jr. have been made defendants in several other proceedings correlated to each other or to the above entitled

cause, either individually or collectively with others, which involve investigation and preparation to properly prepare this cause for a trial thereof.

484 3. That Indictment No. 31760, the above entitled cause, consists of five counts and in counts one to four thereof purports to charge attempt to evade and defeat income taxes imposed upon Consensus Publishing Company for the respective calendar years of 1933 to 1936 both inclusive, and in count five thereof purports to charge conspiracy to evade and defeat income taxes imposed upon Consensus Publishing Company for the years 1929 to 1936 both inclusive.

4. That the said defendant, James M. Ragen, in addition to being a party defendant in the above entitled case, is a party defendant impleaded in six additional pending indictments in this District as follows:

(a) Indictment No. 31762, in which said James M. Ragen is joined and named with eleven others as aiders in an indictment purporting to charge as primary defendant or principal, Moses L. Annenberg, which said indictment consists of six counts, five of which purport to charge attempts to evade and defeat income taxes imposed upon said Annenberg for the respective calendar years of 1932 to 1936 inclusive, and the sixth of which purports to charge a conspiracy to defraud the United States of income taxes imposed upon said Annenberg during that entire period;

(b) Indictment No. 31764, in which this defendant is the sole defendant, which indictment purports to charge this defendant with attempting to evade and defeat his income taxes for the respective years 1933 to 1936 both inclusive;

(c) Indictment No. 31767, consisting of one count for conspiracy under Section 37 of the Criminal Code in which said defendant James M. Ragen is named with five individual defendants and a corporate defendant, viz., Min-Haf Distributing Corporation, a New York Corporation, said indictment purporting to charge conspiracy beginning with January 1, 1930 to the date of indictment 485 in 1939, to defraud the United States of moneys due it for income tax imposed upon said Min-Haf Distributing corporation.

(d) Indictment No. 31765, in which said defendant James M. Ragen is named as a defendant with several

individuals and corporations, consisting of four counts, the first and second whereof purport to charge violation of Section 237 of the Criminal Code and counts three and four whereof purport to charge conspiracy to violate Section 237, said indictment being known as the wire service lottery indictment. Certain proceedings were had in this court with respect to said indictment with which this Honorable Court is familiar.

(e) Indictment No. 31766, in which said defendant James M. Ragen is named as a defendant with several individuals and corporations, consisting of eighteen counts, the first nine whereof purport to charge a violation of Section 213 of the Criminal Code, the so-called lottery section, and counts ten to eighteen whereof purport to charge conspiracy to violate said Section 213. Certain proceedings were had in this court with respect to said indictment with which this Honorable Court is familiar.

(f) Indictment No. _____, returned the 26th day of April, 1940, in which said defendant James M. Ragen is named as a defendant with several individuals and corporations purporting to charge a violation of the lottery section of the Criminal Code.

486 5. That the defendant, James M. Ragen, Jr., in addition to being a party defendant in the above entitled cause is a party defendant in another indictment pending in this District as follows:

(a) Indictment No. 31762, in which said James M. Ragen, Jr. is joined and named with eleven others as aiders in an indictment purporting to charge as primary defendant or principal, Moses L. Annenberg, which said indictment consists of six counts, five of which purport to charge attempts to evade and defeat income taxes imposed upon said Annenberg for the respective calendar years of 1932 to 1936 inclusive, and the sixth whereof to defraud the United States of income taxes imposed upon said Annenberg, during that entire period.

6. That prior to April 23rd, 1940, the said defendants, James M. Ragen and James M. Ragen, Jr., then represented by Kirkland, Fleming, Green, Martin & Ellis, were informed and had every reasonable ground to believe that the government would proceed with the trial of indictment No. 31762, the so-called principal indictment against Moses L. Annenberg first, and that such trial would last several months; that the complexity and the immense amount of

labor involved in the preparation of said case No. 31762, in which said defendants James M. Ragen and James M. Ragen, Jr. were named as co-defendants in the capacity of aiders and abettors was such as to exclude the possibility of further effort necessary to prepare the defense as against any of the other said indictments.

487 7. That on April 23rd, 1940, Moses L. Annenberg and Joseph E. Hafner, the former as Principal and the latter as one of the aiders and abettors named in said Indictment No. 31762, entered a plea of guilty in said cause No. 31762 and said cause was continued as to the other defendants therein, including said James M. Ragen and James M. Ragen, Jr.

8. That upon the entering of the pleas of guilty by said Moses L. Annenberg and Joseph E. Hafner, as last hereinabove stated, the court set the so-called Consensus indictment, meaning the above entitled case No. 31760, for May 23rd, 1940; that affiant was advised from an article appearing in the press of recent date that cause No. 31762 had been continued to June 5th, 1940, and that the government will move to set a trial date for cause No. 31760 on said May 23rd, 1940. This is the first time this affiant has been advised that an effort would be made to set case No. 31760 for actual trial until after the matters attending conclusion of plea of guilty heretofore entered in the so-called principal indictment No. 31762 by Moses L. Annenberg, including the taking of testimony on his behalf pursuant to the statement of his counsel to that effect on April 23rd, 1940, and on which occasion this affiant stated to the court that he could not possibly be ready to proceed in this cause on said date due to lack of opportunity to prepare for trial and other trial engagements.

9. That this affiant was retained as counsel a few days before the date on which said Consensus indictment No. 31760 was set for arraignment and immediately applied himself to the study and investigation of the record in 488 said case No. 31760; that the affiant studied the grounds of demurrer set forth in the demurrer theretofore filed in said case, indictment No. 31760, and from such investigation and study is of the opinion and verily believes that the grounds of the demurrer therein set forth are well and substantially founded in point of law; that said demurrer was not argued due primarily, this affiant is informed, to the exclusive demand of all the time

of preceding counsel being devoted to the preparation for trial in and of the so-called principal indictment No. 31762 on behalf of the said Moses L. Annenberg and the necessity immediately preceding April 23rd, 1940 on their part in arranging the plan and detail of the plea of guilty on his part entered on said date, in which matters of procedure and record this affiant has had no information or knowledge thereof, and is further advised that the said demurrer was overruled pro forma. This affiant further states that the preparation of a supporting memorandum and authorities for the grounds of said demurrer as set forth therein will, with the application of due diligence, require upwards of twenty (20) days to properly advise the court of the position of the respondents herein in reference thereto.

10. This affiant further states that he has prepared for trial four matters, among others, instituted previous to his engagement in this cause, all of which have been heard in part by the trial court and set for conclusion and disposition during June and July, 1940, before the trial judges change calendars, etc.

11. That the preparation of the factual defense in the above indictment No. 31760 involves an immense amount of accounting, auditing and examination of documents including corporate stock records and income tax returns; that only a comparatively small portion of such records has been made available to this affiant. From his 489 study of the matter up to now there appears to be some interrelation of the subject matter of Indictment No. 31762 and other pending indictments with Indictment No. 31760, and if it becomes necessary in the course of the preparation to enlarge the study to include No. 31762 and other pending indictments, further time will be necessary as an essential preliminary to the development and tracing of the accounting and corporate record structure involved in the factual defense under the above entitled Indictment No. 31760; that an investigation sufficient to give the defendant, James M. Ragen and James M. Ragen, Jr., a fair trial under Indictment No. 31760 will require at least four (4) months.

(Sgd) John F. Tyrrell,

Subscribed and sworn to before me this 21st day of May, A. D. 1940.

Henry M. Hilton,
Notary Public.

(Seal)

490 And afterwards, to wit, on the 23rd day of May, A. D. 1940, being one of the days of the regular May term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

Entered
May 23,
1940.

491 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—31760) * *

Thursday, May 23, A. D. 1940.

Present: Honorable James H. Wilkerson, Judge.

This day come the defendants by their attorneys and enter their motion for leave to withdraw their pleas of not guilty and to reinstate demurrer which motion is overruled and this cause is continued for trial to June 5, A. D. 1930.

492 And afterwards, to wit, on the 4th day of June, A. D. 1940, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appear the following entries, to wit:

Entered
June 4,
1940.

493 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—31760) * *

Tuesday, June 4, A. D. 1940.

Present: Honorable Michael L. Igoe, Judge.

On motion of the defendant's attorneys It Is Ordered that the stipulation produced under the order of this Court be and the same is hereby impounded with the Clerk of this Court until the further order of this Court.

494 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois,

Eastern Division.

| | |
|----------------------------|---|
| United States of America, | } Indictments Nos.— |
| <i>Plaintiff.</i> | |
| <i>vs.</i> | |
| Moses L. Annenberg, et al. | |
| <i>Defendants.</i> | 31755, 31760, 31761, 31762, 31765, 31766, 31767, 31768. |

STIPULATION.

It Is Hereby Stipulated by and between the parties, by their counsel, that defendants M. L. Annenberg and Joseph E. Hafner having pleaded "Guilty" to the Fifth Count of Indictment No. 31762, upon the sentencing of M. L. Annenberg and Joseph E. Hafner upon their pleas, the United States will dismiss the following defendants in each of the following indictments:

Indictment No. 31755—M. L. Annenberg, Walter H. Annenberg, Joseph E. Hafner.

Indictment No. 31760—M. L. Annenberg, Jules Taylor, Herbert S. Kamia.

Indictment No. 31761—All defendants.

Indictment No. 31762—M. L. Annenberg, as to all Counts except Fifth Count; Walter H. Annenberg; Joseph E. Hafner, as to all Counts except Fifth Count; Herbert S. Kamin, Harry Friedman, L. Stanley Kahn, Jules Taylor, Charles W. Bidwell, Aaron Trosch, Julius J. Smith.

495 Indictment No. 31763—M. L. Annenberg, Nationwide News Service, Inc., Illinois Nationwide News Service, Inc., Bentley, Murray and Company, Charles W. Bidwell.

Indictment No. 31766—M. L. Annenberg, Nationwide News Service, Inc., Illinois Nationwide News Service, Inc., Bentley, Murray and Company, Charles W. Bidwell.

Indictment No. 31767—M. L. Annenberg, Joseph E.

Hafner, Fred W. Minicus, Ernest B. Fischer, Jules Taylor, Min-Haf Distributing Corporation.

Indictment No. 31768—Julius J. Smith.

(Sgd) William J. Campbell,
William J. Campbell,
United States Attorney.

(Sgd) Weymouth Kirkland,
Weymouth Kirkland,
Counsel for certain Defendants.

(Sgd) Francis X. Busch,
Francis X. Busch,
Counsel for Joseph E. Hafner.

498 And afterwards, to wit, on the 22nd day of July, A. D. 1940, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

Entered
July 22,
1940.

499 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

| | | |
|-----------------------------------|---|-------------------------|
| United States of America, | } | Indictment No. 31760 |
| <i>vs.</i> | | |
| Moses L. Annenberg, <i>et al.</i> | | |

ORDER.

On the motion of the United States Attorney for the Northern District of Illinois to dismiss the indictment in the above entitled cause as to certain defendants,

It Is Ordered that said indictment be and is hereby dismissed as to the following defendants:

Moses L. Annenberg, otherwise known as Moses Louis Annenberg and M. L. Annenberg;
Jules Taylor, otherwise known as J. Taylor, and
Herbert S. Kamin, otherwise known as H. S. Kamin.

Enter:

James H. Wilkerson,
Judge.

Dated at Chicago, Illinois, this 22nd day of July, A. D. 1940.

Filed
July 22,
1940.

500 And on, to wit, the 22nd day of July, A. D. 1940, came the defendants by their attorneys and filed in the Clerk's office of said Court certain Motion in words and figures following, to wit:

501 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

MOTION.

Now comes the United States of America, plaintiff in the above entitled cause, by William J. Campbell, United States Attorney for the Northern District of Illinois, and moves the Court to dismiss the indictment in said cause as to the following defendants:

Moses L. Annenberg, otherwise known as Moses

Louis Annenberg and M. L. Annenberg;

Jules Taylor, otherwise known as J. Taylor, and

Herbert S. Kamin, otherwise known as H. S. Kamin.

William J. Campbell,

United States Attorney.

Dated at Chicago, Illinois, this 22nd day of July, A. D. 1940.

496 And afterwards, to wit, on the 4th day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter C. Lindley, District Judge, appears the following entry, to wit:

497 IN THE DISTRICT COURT OF THE UNITED STATES

Entered
Sept. 4,
1940.

For the Northern District of Illinois,

Eastern Division.

Wednesday, September 4, A. D. 1940.

Present: Honorable Walter C. Lindley, Judge.

United States of America,

vs.

William Molasky, Arnold W.
Kruse, Lester A. Kruse, James
M. Ragen, Sr., James M. Ragen,
Jr., The Consensus Publishing
Company, an Illinois Corpora-
tion.

No. 31760.

This day again comes the United States by the United States Attorney come also the defendants in their own proper persons and on motion of John M. Tyrrell Esquire it is

Ordered that leave be and the same is hereby given him to withdraw his appearance as attorney for James M. Ragen, Sr. and James M. Ragen, Jr. and it is ordered by the Court that the demurrer as to James M. Ragen, Sr. and James M. Ragen, Jr. be and the same is hereby overruled to which ruling of the Court the defendants by their attorneys duly except.

It Is Further Ordered that the defendants' motion for a bill of particulars be and the same is hereby denied to which ruling of the Court the defendants by their attorney duly except and on motion of John McInerney Esquire it is ordered that leave be and the same is hereby given him to enter his appearance as attorney for the defendants James M. Ragen, Sr. and James M. Ragen, Jr.

502 And on, to wit, the 10th day of September, A. D. 1940, came the defendants by their attorneys and filed in the Clerk's office of said Court certain Motions to Dismiss Indictment and for a Directed Verdict, in words and figures following, to wit:

Filed
Sept. 10,
1948.

503 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—31760) • •

MOTION TO DISMISS THE INDICTMENT AND FOR A DIRECTED VERDICT.

Comes now the defendants, Arnold W. Kruse and Lester A. Kruse, individually and separately, at the close of all the evidence adduced herein by and on behalf of the Government and move the court to dismiss the indictment and each and every count thereof and the proceedings thereunder and to direct the jury to find and return a verdict of "Not Guilty" upon the said indictment and upon each and every count thereof as to the defendants, Arnold W. Kruse and Lester A. Kruse, and as to each of said defendants separately, and in support thereof specify the following reasons and grounds:

1. Each count of the indictment fails to allege any facts showing that these defendants or either of them committed any offense against the United States.

504 2. Each of the first four counts of the indictment fails to describe and to particularize the alleged attempts to evade and defeat taxes with sufficient definiteness and certainty and so specifically as to charge any offense against the United States by these defendants or either of them and as to enable these defendants or either of them to prepare and make their defense thereto and to plead an acquittal or conviction thereunder in bar to any other proceedings against them or either of them based on the same matters or things or on any of them on which the said counts are based.

3. The fifth count of the indictment fails to describe and to particularize the alleged combination, conspiracy, confederation, and agreement and the means agreed upon to accomplish the purposes thereof with sufficient definiteness and certainty and so specifically as to charge any offense against the United States by these defendants or either of them and so as to enable these defendants or either of them to prepare and make their defense thereto and to plead an acquittal or conviction thereunder in bar to any other proceedings against them or either of them based on the same matters or things or on any of them on which the said count is based.

505 4. All of the evidence in the case wholly fails to establish the allegations of any of the counts of the indictment and wholly fails to establish any allegation of any of the counts of the indictment upon which a verdict other than a verdict of "Not Guilty" upon the indictment and each and every count thereof can be sustained by the evidence in the case and the law of the case as to these defendants and each of them.

5. All of the substantial evidence in the case wholly fails to establish that these defendants or either of them did unlawfully, wilfully, or knowingly attempt to evade or defeat any part of any tax imposed on the net income of the Consensus Publishing Company, a corporation, for the calendar year, 1933, as charged in the first count of the indictment, or for the calendar year, 1934, as charged in the second count of the indictment, or for the calendar year, 1935, as charged in the third count of the indictment, or for the calendar year, 1936, as charged in the fourth count of the indictment.

6. All of the substantial evidence in the case wholly fails to establish that these defendants or either of them did unlawfully, wilfully, knowingly, or feloniously 506 combine, conspire, confederate or agree with any person or persons to wilfully attempt to evade or defeat the payment of any part of taxes imposed upon the Consensus Publishing Company, a corporation, for the calendar years 1929 to 1936, both dates inclusive, or any period or periods therein included, as charged in the fifth count of the indictment.

7. All of the substantial evidence in the case wholly fails to establish that these defendants or either of them committed any overt act in pursuance of the combination, conspiracy, confederation and agreement charged in the fifth count of the indictment.

8. All the substantial competent evidence in this case is as consistent with the presumption of the innocence of these defendants and each of them upon each and every count of the indictment as it is consistent with the guilt of these defendants or either of them of any of the offenses, if any, charged in the indictment or any count thereof.

9. There is no substantial competent evidence in this case of facts which exclude beyond a reasonable doubt every other hypothesis but that of the guilt of these defendants or either of them of any of the offenses, if

any, charged in the indictment or any count thereof.
 507 10. All of the substantial evidence of the case
 wholly fails to establish that these defendants or
 either of them committed any offense against the United
 States.

Warren Canady,
 Joseph A. Struett,
Attorneys for Defendants.
Lester A. Kruse and Ar-
nold W. Kruse.

508 IN THE DISTRICT COURT OF THE UNITED STATES
 OF AMERICA.

• • (Caption—31760) • •

MOTION TO DISMISS THE INDICTMENT AND FOR A DIRECTED VERDICT.

Come now the defendants, James M. Ragen and James M. Ragen, Jr., individually and separately, at the close of all the evidence adduced herein by and on behalf of the Government and move the court to dismiss the indictment and each and every count thereof and the proceedings thereunder and to direct the jury to find and return a verdict of "Not Guilty" upon the said indictment and upon each and every count thereof as to the defendants, James M. Ragen and James M. Ragen, Jr., and as to each of said defendants separately, and in support thereof specify the following reasons and grounds:

1. Each count of the indictment fails to allege any facts showing that these defendants or either of them com-
 509 mitted any offense against the United States.

2. Each of the first four counts of the indictment fails to describe and to particularize the alleged attempts to evade and defeat taxes with sufficient definiteness and certainty and so specifically as to charge any offense against the United States by these defendants or either of them and as to enable these defendants or either of them to prepare and make their defense thereto and to plead an acquittal or conviction thereunder in bar to any other proceedings against them or either of them based on the same matters or things or on any of them on which said counts are based.

3. The fifth count of the indictment fails to describe and

to particularize the alleged combination, conspiracy, confederation, and agreement and the means agreed upon to accomplish the purposes thereof with sufficient definiteness and certainty and so specifically as to charge any offense against the United States by these defendants or either of them and so as to enable these defendants or either of them to prepare and make their defense thereto and to plead an acquittal or conviction thereunder in bar to any other proceedings against them or either of them based on the same matters or things or on any of them on which the said count is based.

510 4. All of the evidence in the case wholly fails to establish the allegations of any of the counts of the indictment and wholly fails to establish any allegation of any of the counts of the indictment upon which a verdict other than a verdict of "Not Guilty" upon the indictment and each and every count thereof can be sustained by the evidence in the case and the law of the case as to these defendants and each of them.

5. All of the substantial evidence in the case wholly fails to establish that these defendants or either of them - did unlawfully, willfully, or knowingly attempt to evade or defeat any part of any tax imposed on the net income of the Consensus Publishing Company, a corporation, for the calendar year, 1933, as charged in the first count of the indictment, or for the calendar year, 1934, as charged in the second count of the indictment, or for the calendar year, 1935, as charged in the third count of the indictment, or for the calendar year, 1936, as charged in the fourth count of the indictment.

6. All of the substantial evidence in the case wholly fails to establish that these defendants or either of them did unlawfully, willfully, knowingly, or feloniously combine, conspire, confederate or agree with any person 511 or persons to willfully attempt to evade or defeat the payment of any part of taxes imposed upon the Consensus Publishing Company, a corporation, for the calendar years 1929 to 1936, both dates inclusive, or any period or periods therein included, as charged in the fifth count of the indictment.

7. All of the substantial evidence in the case wholly fails to establish that these defendants or either of them committed any overt act in pursuance of the combination, conspiracy, confederation and agreement charged in the fifth count of the indictment.

8. All the substantial competent evidence in this case is as consistent with the presumption of the innocence of these defendants and each of them upon each and every count of the indictment as it is consistent with the guilt of these defendants or either of them of any of the offenses, if any, charged in the indictment or any count thereof.

9. There is no substantial competent evidence in this case of facts which exclude beyond a reasonable doubt every other hypothesis but that of the guilt of these defendants or either of them of any of the offenses, if any, charged in the indictment or any count thereof.

512 10. All of the substantial evidence of the case wholly fails to establish that these defendants or either of them committed any offense against the United States.

John L. McInerney,
*Attorney for defendants, James M.
Ragen and James M. Ragen, Jr.*

513 IN THE DISTRICT COURT OF THE UNITED STATES OF
AMERICA.

• • (Caption) • •

MOTION TO DISMISS THE INDICTMENT AND FOR A DIRECTED VERDICT.

Comes now the defendant, William Molasky, at the close of all the evidence adduced herein by and on behalf of the Government and moves the court to dismiss the indictment and each and every count thereof and the proceedings thereunder and to direct the jury to find and return a verdict of "Not Guilty" upon the said indictment and upon each and every count thereof as to the defendant, William Molasky, and in support thereof specify the following reasons and grounds:

1. Each count of the indictment fails to allege any facts showing that this defendant committed any offense against the United States.

514 2. Each of the first four counts of the indictment fails to describe and to particularize the alleged attempts to evade and defeat taxes with sufficient definiteness and certainty and so specifically as to charge any offense against the United States by this defendant and as to enable this defendant to prepare and make his defense

thereto and to plead an acquittal or conviction thereunder in bar to any other proceedings against him based on the same matters or things or on any of them on which the said counts are based.

3. The fifth count of the indictment fails to describe and to particularize the alleged combination, conspiracy, confederation, and agreement and the means agreed upon to accomplish the purposes thereof with sufficient definiteness and certainty and so specifically as to charge any offense against the United States by this defendant to prepare and make his defense thereto and to plead an acquittal or conviction thereunder in bar to any other proceedings against him based on the same matters or things or on any of them on which the said count is based.

515 4. All of the evidence in the case wholly fails to establish the allegations of any of the counts of the indictment and wholly fails to establish any allegation or any of the counts of the indictment upon which a verdict other than a verdict of "Not Guilty" upon the indictment and each and every count thereof can be sustained by the evidence in the case and the law of the case as to this defendant.

5. All of the substantial evidence in the case wholly fails to establish that this defendant did unlawfully, willfully, or knowingly attempt to evade or defeat any part of any tax imposed on the net income of the Consensus Publishing Company, a corporation, for the calendar year, 1933, as charged in the first count of the indictment, or for the calendar year, 1934, as charged in the second count of the indictment, or for the calendar year, 1935, as charged in the third count of the indictment, or for the calendar year, 1936, as charged in the fourth count of the indictment.

6. All of the substantial evidence in the case wholly fails to establish that this defendant did unlawfully, willfully, knowingly, or feloniously combine, conspire, confederate or agree with any person or persons to willfully attempt to evade or defeat the payment of any part of taxes imposed upon the Consensus Publishing Company, a corporation, for the calendar years 1929 to 1936, both dates inclusive, or any period or periods therein included, as charged in the fifth count of the indictment.

7. All of the substantial evidence in the case wholly fails to establish that this defendant committed any overt

act in pursuance of the combination, conspiracy, confederation and agreement charged in the fifth count of the indictment.

8. All the substantial competent evidence in this case is as consistent with the presumption of the innocence of this defendant upon each and every count of the indictment as it is consistent with the guilt of this defendant of any of the offenses, if any, charged in the indictment or any count thereof.

9. There is no substantial competent evidence in this case of facts which exclude beyond a reasonable doubt every other hypothesis but that of the guilt of this defendant of any of the offenses, if any, charged in the indictment or any count thereof.

517 10. All of the substantial evidence of the case wholly fails to establish that this defendant committed any offense against the United States.

David Baron,

Attorney for defendant, William Molasky.

Entered
Sept. 11,
1940.

518 And afterwards, to wit, on the 11th day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter C. Lindley, District Judge appears the following, to wit:

519 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

Wednesday, September 11, A. D. 1940.

Present: Honorable Walter C. Lindley, Judge.

This day again comes the United States by the United States Attorney come also the defendants in their own proper persons and the Jury heretofore empaneled herein for the trial of said cause also come and thereupon at the close of the Government's evidence the defendants by their attorneys enter their motion to dismiss and for a directed verdict which motion is overruled to which ruling of the Court the defendants by their attorneys duly except and the defendants introducing no evidence on their behalf by

their attorneys renew their motion for a directed verdict which motion is overruled to which ruling of the Court the defendants by their attorneys duly except and it is Ordered that this cause be and the same is hereby continued to 9:00 A. M. September 12, A. D. 1940.

520 And on, to wit, the 12th day of September, A. D. 1940 were filed in the Clerk's office of said Court Two Verdicts in words and figures following, to wit: Filed
Sept. 12,
1940.

521 • • (Caption—31760) • •

We, the Jury, find the Defendants, William Molasky, Arnold W. Kruse, James M. Ragen, Sr., James M. Ragen, Jr., The Consensus Publishing Co., an Illinois Corporation guilty as charged in the indictment.

Merrill W. Tilden,
Wm. K. Lawrence,
Henrietta M. Seipp (Mrs. C. T.),
Serena Spencer (Mrs. W. H.),
Mabel H. Jones (Mrs. N. P.),
Thomas J. Tabor,
Edward C. Oetter,
Harry R. Wondergern,
Florence B. Iler,
Blanche V. N. Lundberg,
Mabel Hoganson,
Joseph G. Uedelhofen,

Foreman.

522 Endorsed: Verdict Returned in open Court Sept. 12, 1940. Filed Sept. 12, 1940. Hoyt King, Clerk.

523

UNITED STATES DISTRICT COURT.

• • (Caption—31760) • •

We, the Jury, find the defendant, Lester A. Kruse, guilty as charged in #4 and #5 counts, and not guilty as charged in #1, #2 and #3 counts of the Indictment.

M. W. Tilden,
 Mabel Hoganson,
 Blanche V. N. Lundberg,
 Florence B. Iler,
 Harry R. Wondergern,
 Edward C. Oetter,
 Wm. K. Lawrence,
 Thomas J. Tabor,
 Serena Spencer (Mrs. W. H.),
 Mabel H. Jones (Mrs. N. P.),
 Henrietta M. Seipp (Mrs. C. T.),
 Joseph G. Uedelhofen,
Foreman.

524 Endorsed: Verdict returned in open Court Sept. 12, 1940. Filed Sept. 12, 1940. Hoyt King, Clerk.

Entered
 Sept. 12,
 1940.

525 And afterwards, to wit, on the 12th day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter C. Lindley, District Judge appears the following entry, to wit:

526 IN THE DISTRICT COURT OF THE UNITED STATES.
 • • (Caption—31760) • •

Thursday, September 12, A. D. 1940.

Present: Honorable Walter C. Lindley, Judge.

This day again comes the United States by the United States Attorney come also the defendants William Molakky, Arnold W. Kruse, Lester A. Kruse, James M. Ragen, Sr., James M. Ragen, Jr., in their own proper persons and the Consensus Publishing Company, an Illinois Corporation, by its attorney also comes and the jury heretofore

empaneled herein for the trial of said cause also come and the jury having heard the arguments of counsel and charge of the Court retire to their room to consider of their verdict and afterwards return into open court and render their verdict and upon their oath do say "We the Jury find the defendants William Molasky, Arnold W. Krase, James M. Ragen, Sr., James M. Ragen, Jr., and the Consensus Publishing Company guilty as charged in the indictment and "We the Jury find the defendant Lester A. Kruse guilty on counts 4 and 5 and not guilty on counts 1, 2 and 3" whereupon the defendants by their attorneys enter their motion for a new trial in said cause which motions are overruled to which ruling of the Court the defendants by their attorneys duly except and leave be and the same is hereby given the defendants to file written points within three days from this date. Thereupon the defendants by their attorneys enter herein their motions in arrest of judgment which motion is overruled to which ruling of the Court the defendants by their attorneys duly except.

527 And afterwards, to wit, on the 12th day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter C. Lindley, District Judge appear the following entries, to wit:

Entered
Sept. 12,
1940.

528 IN THE DISTRICT COURT OF THE UNITED STATES OF
AMERICA

For the Northern District of Illinois,
Eastern Division.

United States of America }
vs. } D. C. No. 31760.
James M. Ragen.

This day comes the United States of America by the United States Attorney and also comes the defendant, James M. Ragen, otherwise known as J. M. Ragen, James M. Ragen, Sr., and J. M. Ragen, Sr., in his own proper person and by his counsel, after a trial of the issues in the

above entitled cause by a jury duly empaneled in said cause and a verdict having been returned herein by the said jury finding the said defendant James M. Ragen guilty on all counts as charged in the indictment herein, and the said defendant files herein his motion for a new trial in said cause; thereupon this cause coming on to be heard on the defendant's motion heretofore entered herein for a new trial in said cause, and after arguments of counsel and due deliberation by the Court said motion is overruled and a new trial denied to which ruling of the Court the defendant duly excepts; whereupon the defendant enters herein his motion in arre of judgment which motion is also overruled to which ruling of the Court the defendant duly excepts; and the defendant being asked by the Court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not now be pronounced, it is therefore considered and

Ordered by the Court and it is the sentence and judgment of the Court upon the verdict of guilty so rendered by the jury aforesaid that the defendant James M. Ragen, otherwise known as J. M. Ragen, James M. Ragen, Sr., and J. M. Ragen, Sr., be committed to the custody of the Attorney General of the United States of America to be confined in a penitentiary for a period of One (1) Year and One (1) Day and forfeit and pay to the United States a fine in the sum of Ten Thousand (\$10,000.00) Dollars and to stand committed until said fine is paid.

Enter:

(Sgd) Walter C. Lindley,

United States District Judge.

Dated: September 12, 1940.

Entered
Sept. 12,
1940.

530 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

• • (Caption—31760) • •

This day comes the United States of America by the United States Attorney and also comes the defendant, James M. Ragen, Jr., otherwise known as J. M. Ragen, Jr., in his own proper person and by his counsel, after a trial

of the issues in the above entitled cause by a jury duly empaneled in said cause and a verdict having been returned herein by the said jury finding the said defendant James M. Ragen, Jr., guilty on all counts as charged in the indictment herein, and the said defendant files herein his motion for a new trial in said cause; thereupon this cause coming on to be heard on the defendant's motion heretofore entered herein for a new trial in said cause, and after arguments of counsel and due deliberation by the Court said motion is overruled and a new trial denied to which ruling of the Court the defendant duly excepts; whereupon the defendant enters herein his motion in arrest of judgment which motion is also overruled to which ruling of the Court the defendant duly excepts; and the defendant being asked by the Court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not now be pronounced, it is therefore considered and

Ordered by the Court and it is the sentence and judgment of the Court upon the verdict of guilty so rendered by the jury aforesaid that the defendant James

M. Ragen, Jr., otherwise known as J. M. Ragen, Jr., forfeit and pay to the United States a fine in the sum of One Thousand (\$1,000.00) Dollars and to stand committed until said fine is paid.

Enter:

(Sgd) Walter C. Lindley,
United States District Judge.

Dated: September 12, 1940.

532 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA,

Entered
Sept. 12,
1940.

For the Northern District of Illinois,

Eastern Division.

United States of America, }
vs. } D. C. No. 31760.
Arnold W. Kruse, }

This day comes the United States of America by the United States Attorney and also comes the defendant, Arnold W. Kruse, otherwise known as A. W. Kruse, in his

own proper person and by his counsel, after a trial of the issues in the above entitled cause by a jury duly impaneled in said cause and a verdict having been returned herein by the said jury finding the said defendant Arnold W. Kruse guilty on all counts as charged in the indictment herein, and the said defendant files herein his motion for a new trial in said cause; thereupon this cause coming on to be heard on the defendant's motion heretofore entered herein for a new trial in said cause, and after arguments of counsel and due deliberation by the Court said motion is overruled and a new trial denied to which ruling of the Court the defendant duly excepts; whereupon the defendant enters herein his motion in arrest of judgment which motion is also overruled to which ruling of the Court the defendant duly excepts; and the defendant being asked by the Court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not now be pronounced, it is therefore considered and

Ordered by the Court and it is the sentence and judgment of the Court upon the verdict of guilty so rendered by the jury aforesaid that the defendant Arnold

533 W. Kruse, otherwise known as A. W. Kruse, be committed to the custody of the Attorney General of the United States of America to be confined in a penitentiary for a period of eighteen (18) months and to forfeit and pay to the United States a fine in the sum of Ten Thousand (\$10,000.00) Dollars and to stand committed until said fine is paid.

Dated: September 12, 1940.

Enter:

Sgd. Walter C. Lindley,

United States District Judge.

Entered
Sept. 12,
1940.

534 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA,

For the Northern District of Illinois,
Eastern Division.

United States of America, }
vs. } D. C. No. 31760.
Lester A. Kruse. }

This day comes the United States of America by the United States Attorney and comes also the defendant Lester A. Kruse, otherwise known as Lester Kruse, in his own proper person and by his counsel, after a trial of the issues in the above entitled cause by a jury duly empaneled in said cause and a verdict having been returned herein by the said jury finding the said defendant Lester A. Kruse guilty as charged in Counts Four and Five of the indictment herein and not guilty on Counts One, Two and Three of said indictment, and the said defendant files herein his motion for a new trial in said cause; thereupon this cause coming on to be heard on the defendant's motion heretofore entered herein for a new trial in said cause, and after arguments of counsel and due deliberation by the Court said motion is overruled and a new trial denied to which ruling of the Court the defendant duly excepts; whereupon the defendant enters herein his motion in arrest of judgment which motion is also overruled to which ruling of the Court the defendant duly excepts; and the defendant being asked by the Court if he has anything to say why sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not now be pronounced, it is therefore considered and

Ordered by the Court and it is the sentence and judgment of the Court upon the verdict of guilty so rendered by the jury aforesaid that the defendant Lester A. Kruse, otherwise known as Lester Kruse, forfeit and pay to the United States a fine in the sum of One Thousand (\$1,000.00) Dollars and to stand committed until said fine is paid.

Dated: September 12, 1940.

Enter:

Sgd. Walter C. Lindley,
United States District Judge.

Entered
Sept. 12,
1940.

536 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA,

For the Northern District of Illinois,
Eastern Division.

United States of America, }
vs. } D. C. No. 31760.
William Molasky, }

This day comes the United States of America by the United States Attorney and also comes the defendant, William Molasky, in his own proper person and by his counsel, after a trial of the issues in the above entitled cause by a jury duly empaneled in said cause and a verdict having been returned herein by the said jury finding the said defendant William Molasky guilty on all counts as charged in the indictment herein, and the said defendant files herein his motion for a new trial in said cause; thereupon this cause coming on to be heard on the defendant's motion heretofore entered herein for a new trial in said cause, and after arguments of counsel and due deliberation by the Court said motion is overruled and a new trial denied to which ruling of the Court the defendant duly excepts; whereupon the defendant enters herein his motion in arrest of judgment which motion is also overruled to which ruling of the Court the defendant duly excepts; and the defendant being asked by the Court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not now be pronounced, it is therefore considered and

Ordered by the Court and it is the sentence and judgment of the Court upon the verdict of guilty so rendered by the jury aforesaid that the defendant William Molasky be committed to the custody of the Attorney General of the United States of America to be confined in a penitentiary for a period of One (1) Year and forfeit and pay to the United States a fine in the sum of Ten Thousand (\$10,000.00) Dollars and to stand committed until said fine is paid

Dated: September 12, 1940.

Enter:

Sgd. Walter C. Lindley,
United States District Judge.

538 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

Entered
Sept. 12,
1942.

For the Northern District of Illinois,
Eastern Division.

United States of America. }
vs. } D. C. No. 31760.
The Consensus Publishing Company. }

This day comes the United States of America by the United States Attorney and comes also the defendant, The Consensus Publishing Company, a corporation, by its counsel, after a trial of the issues in the above entitled cause by a jury duly empaneled in said cause and a verdict having been returned herein by the said jury finding the said defendant The Consensus Publishing Company guilty on all counts as charged in the indictment herein, and the said defendant files herein its motion for a new trial in said cause; thereupon this cause coming on to be heard on the defendant's motion heretofore entered herein for a new trial in said cause, and after arguments of counsel and due deliberation by the Court said motion is overruled and a new trial denied to which ruling of the Court the defendant duly excepts; whereupon the defendant enters herein its motion in arrest of judgment which motion is also overruled to which ruling of the Court the defendant duly excepts; and the defendant being asked by the Court if it has anything to say why the sentence and judgment of the court should not now be pronounced upon it and showing no good and sufficient reasons why sentence and judgment should not now be pronounced, it is therefore considered and

Ordered by the Court and it is the sentence and judgment of the Court upon the verdict of guilty so rendered by the jury aforesaid that the defendant The Consensus Publishing Company forfeit and pay to the United States a fine in the sum of Fifteen Thousand (\$15,000.00) Dollars on the first four counts and a fine in the sum of Five Thousand (\$5,000.00) Dollars on the fifth count of the indictment herein.

Dated: September 12, 1940.

Enter:

Sgd. Walter C. Lindley,
United States District Judge.

Entered
Sept. 12,
1940.

540 And afterwards, to wit, on the 12 day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter C. Lindley, District Judge appears the following entry, to wit:

541 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Thursday, September 12, A. D. 1940.

Present: Honorable Walter C. Lindley, Judge.

United States of America, }
vs. } No. 31760.
William Molasky, *et al.* }

On motion of the defendants' attorneys it is Ordered that execution of sentence be and the same is hereby stayed as to the defendants William Molasky, Arnold W. Kruse, James M. Ragen, Sr. and the Consensus Publishing Company for a period of five days pending notice of appeal, supersedeas bonds fixed at the sum of ten thousand dollars as to each of the defendants and

It Is Ordered that the bonds heretofore filed are to remain in full force and effect.

542 And afterwards, to wit, on the 12th day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter C. Lindley, District Judge appears the following entry, to wit:

543 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption--31760) * *

Entered
Sept. 12,
1940.

Thursday, September 12, A. D. 1940.

Present: Honorable Walter C. Lindley, Judge.

On motion of the defendants' attorney it is Ordered that bonds in appeal as to the defendants Lester A. Kruse and James M. Ragen, Jr. be and the same are hereby fixed in the sum of Two Hundred and Fifty (\$250.00) Dollars each.

544 And on, to wit, the 14th day of September, A. D. 1940 came the Defendants by their attorneys and filed in the Clerk's office of said Court Five Motions for New Trial in words and figures following, to wit:

Filed
Sept. 14,
1940.

545 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

United States of America,

vs.

William Molasky, Arnold W. Kruse,
Lester A. Kruse, James W. Ragen,
James M. Ragen, Jr., and The Con-
sensus Publishing Company, an
Illinois corporation.

Indictment
No. 31760.

MOTION FOR NEW TRIAL.

Comes now the defendant, Lester A. Kruse, by Warren Canaday and Joseph A. Struett, his attorneys, and moves the Court to grant him a new trial in the above entitled cause and as grounds therefor shows:

1. The verdict of the jury and the judgment entered pursuant thereto is against the evidence.
2. The verdict of the jury and the judgment entered pursuant thereto is against the law.
3. The verdict of the jury and the judgment of the Court entered pursuant thereto is against the law and the evidence.

546 4. The court erred in denying defendant's motion for a directed verdict of not guilty at the close of the government's evidence and at the close of all the evidence (no evidence having been submitted by any defendant) in that the evidence as offered by the government was wholly insufficient to justify the submission of the question of the guilt of this defendant to the jury on any charges of the indictment or under any of the charges of any count of the indictment.

5. There was a fatal variance between the allegations of the indictment and the proof offered by the government.

6. The court erred in denying defendant's motion for a directed verdict of not guilty both at the close of the government's evidence and at the close of all the evidence in that the government's own proof conclusively established that services were rendered by each of the individual defendants and particularly this defendant for which they are entitled to compensation in the form of commissions and which constituted a deductible item of expense from the defendant corporation's income tax returns.

7. The court erred in denying defendant's motion for a directed verdict of not guilty at the close of the government's evidence and at the close of all the evidence in that
the submission of this case to the jury permitted them
547 to speculate and conjecture as to the defendants' guilt,
there being no evidence to justify a verdict against any of the defendants and particularly this defendant on any count of the indictment.

8. The court erred in denying defendant's motion for a directed verdict of not guilty both at the close of the government's evidence and at the close of all the evidence in that the government failed to meet the proof required of them. The sole issue raised in this case was the claim of the government that certain percentages of profits of the defendant company were paid to the defendants, or certain of them, as commissions and that said amounts so paid in their entirety were not deductible as an expense of the corporation in that they constituted a distribution of net profits, that is dividends, because the defendants performed no services whatsoever for the company in payment therefor. The evidence conclusively showed that the defendants performed services for the company and, further, that the payment to the defendants of certain portions of these profits in the form of commissions bore some relation to the services rendered by the defendants

to the corporation. Since the only question in issue was the propriety of the deductions for commissions in the income tax returns, the burden of the proof rested on the government to show that these commissions so paid to the defendants for services rendered were so unreasonable and so disproportionate to the services rendered as to constitute a distribution of profits or dividends and not a payment for services performed or commissions, and no such evidence was offered by the government.

9. The court erroneously instructed the jury as to the real issues in this case in that it permitted the jury to speculate and indulge in conjecture as to what portions of the commissions deducted constituted dividends and what portions constituted reasonable compensation for salary. This is reflected by the instructions of the court, as follows:

"It is a vital question in this case of whether Consensus Publishing Company was entitled to deduct from its income the sums distributed to the defendants as ordinary and necessary expenses of its business. The question is whether it should not rather have reported that those distributions were distributions of the profits of the company to its shareholders rather than the payment of compensation to employees and about that this whole case centers * * *.

"Men that work for corporations are entitled to proper compensation * * *. On the other hand, shareholders are entitled to a division of the profits of the corporation in the way of dividends and it is for you to decide whether these were, or whether a substantial portion thereof was a distribution of profits rather than the compensation of employees. I use the words 'These sums, or a substantial portion thereof'. It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits. It is not necessary that the government prove all of the figures; precisely as they are charged in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern in the amounts charged in the indictment, or substantial parts thereof, diverted them from the form of profits and received them in the form of commissions, that is, as I said, comes back always to the ultimate question that you have got to decide."

These instructions in effect permitted the jury to speculate and indulge in conjecture as to what portions of the

commissions charged were in payment of services rendered, and hence a proper deduction, and what portions were not compensation for services rendered but dividends without any evidence in the record from which the jury could so determine.

The evidence was wholly insufficient to establish a violation of any criminal statute of the United States or any charge in the indictment contained.

Lester A. Kruse,

By Warren A. Canady,

Joseph A. Struett,

His Attorneys.

550 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

MOTION FOR NEW TRIAL.

Comes the defendant, James M. Ragon, by John L. McInerney, his attorney, and moves for a new trial and as grounds therefor shows:

1. The verdict is against the evidence.
2. The verdict is against the law.
3. The verdict is against the law and the evidence.
4. The court erred in admitting improper, irrelevant, immaterial and incompetent evidence offered on behalf of the Government.
5. The court failed to instruct the jury in accordance with the law, but on the contrary thereof, gave in-
551 structions which did not correctly state the law applicable to the case.
6. The court erred in refusing the motion of the defendant for a directed verdict at the close of the government's case and at the close of all the evidence.

John L. McInerney,

Attorney for said defendant.

55 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—31760) • •

MOTION FOR NEW TRIAL.

Comes the defendant, James M. Ragen, Jr., by John L. McInerney, his attorney, and moves for a new trial and as grounds therefor shows:

1. The verdict is against the evidence.
2. The verdict is against the law.
3. The verdict is against the law and the evidence.
4. The court erred in admitting improper, irrelevant, immaterial and incompetent evidence offered on behalf of the Government.
5. The court failed to instruct the jury in accordance with the law, but on the contrary thereof, gave instructions which did not correctly state the law applicable to the case.
- 553 6. The court erred in refusing the motion of the defendant for a directed verdict at the close of the Government's case and at the close of all the evidence.

John L. McInerney,

Attorney for said defendant.

554 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—31760) • •

MOTION FOR NEW TRIAL.

Comes now the defendant, William Molasky, by David Baron, his attorney, and moves the Court to grant him a new trial in the above entitled cause and as grounds therefor shows:

1. The verdict of the jury and the judgment entered pursuant thereto is against the evidence.
2. The verdict of the jury and the judgment entered pursuant thereto is against the law.
3. The verdict of the jury and the judgment of the court entered pursuant thereto is against the law and the evidence.
- 555 4. The court erred in admitting incompetent, improper, irrelevant and immaterial evidence offered on behalf of the government.

5. The court failed to instruct the jury in accordance with the law, but on the contrary gave instructions which did not correctly state the law applicable to the case.

6. The court erred in refusing the motion of the defendant for a directed verdict at the close of the government's case and at the close of all the evidence.

7. There was a fatal variance between the allegations in the indictment and the proof offered by the government.

David Baron,

Attorney for the Defendant,
William Molasky.

556 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

MOTION FOR NEW TRIAL.

Comes now the defendant, Arnold W. Kruse, by Warren Canaday and Joseph A. Struett, his attorneys, and moves the Court to grant him a new trial in the above entitled cause and as grounds therefor shows:

1. The verdict of the jury and the judgment entered pursuant thereto is against the evidence.

2. The verdict of the jury and the judgment entered pursuant thereto is against the law.

3. The verdict of the jury and the judgment of the Court entered pursuant thereto is against the law and the evidence.

557 4. The court erred in denying defendant's motion for a directed verdict of not guilty at the close of the government's evidence and at the close of all the evidence (no evidence having been submitted by any defendant) in that the evidence as offered by the government was wholly insufficient to justify the submission of the question of the guilt of this defendant to the jury on any charges of the indictment or under any of the charges of any count of the indictment.

5. There was a fatal variance between the allegations of the indictment and the proof offered by the government.

6. The court erred in denying defendant's motion for a directed verdict of not guilty both at the close of the government's evidence and at the close of all the evidence in that the government's own proof conclusively

established that services were rendered by each of the individual defendants and particularly this defendant for which they are entitled to compensation in the form of commissions and which constituted a deductible item of expense from the defendant corporation's income tax returns.

7. The court erred in denying defendant's motion for a directed verdict of not guilty at the close of the government's evidence and at the close of all the evidence in that the submission of this case to the jury permitted them to speculate and conjecture as to the defendants' guilt, there being no evidence to justify a verdict against any of the defendants and particularly this defendant on any count of the indictment.

8. The court erred in denying defendant's motion for a directed verdict of not guilty both at the close of the government's evidence and at the close of all the evidence in that the government failed to meet the proof required of them. The sole issue raised in this case was the claim of the government that certain percentages of profits of the defendant company were paid to the defendants, or certain of them, as commissions and that said amounts so paid in their entirety were not deductible as an expense of the corporation in that they constituted a distribution of net profits, that is dividends, because the defendants performed no services whatsoever for the company in payment therefor. The evidence conclusively showed that the defendants performed services for the company and, further, that the payment to the defendants of certain portions of these profits in the form of commissions bore some relation to the services rendered by the defendants to the corporation. Since the only question in issue was the propriety of the deductions for commissions in the income tax returns, the burden of the proof rested on the government to show that these commissions so paid to the defendants for services rendered were so unreasonable and so disproportionate to the services rendered as to constitute a distribution of profits or dividends and not a payment for services performed or commissions, and no such evidence was offered by the government.

9. The court erroneously instructed the jury as to the real issues in this case in that it permitted the jury to speculate and indulge in conjecture as to what portions of the commissions deducted constituted dividends and

what portions constituted reasonable compensation for salary. This is reflected by the instructions of the court, as follows:

"It is a vital question in this case of whether Consensus Publishing Company was entitled to deduct from its income the sums distributed to the defendants as ordinary and necessary expenses of its business. The question is whether it should not rather have reported that those distributions were distributions of the profits of the company to its shareholders rather than the payment of compensation to employees and about that this whole case centers * * *.

"Men that work for corporations are entitled to proper compensation * * *. On the other hand, shareholders are entitled to a division of the profits of the corporation in the way of dividends and it is for you to decide whether these were, or whether a substantial portion thereof was a distribution of profits rather than the compensation of employees. I use the words 'These sums, or a substantial portion thereof'. It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits. It is not necessary that the government prove all of the figures precisely - they are charged in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern in the amounts charged in the 560 indictment, or substantial parts thereof, diverted them from the form of profits and received them in the form of commissions, that is, as I said, comes back always to the ultimate question that you have got to decide."

These instructions in effect permitted the jury to speculate and indulge in conjecture as to what portions of the commissions charged were in payment of services rendered, and hence a proper deduction, and what portions were not compensation for services rendered but dividends without any evidence in the record from which the jury could so determine.

The evidence was wholly insufficient to establish a violation of any criminal statute of the United States or any charge in the indictment contained.

Arnold W. Kruse,
By Warren Canady,
Joseph A. Struett,
His Attorneys.

561 And on, to wit, the 14th day of September, A. D. ^{Filed} 1940 came the Defendants by their attorneys and ^{Sept. 14,} filed in the Clerk's office of said Court Five Motions in ^{1940.} Arrest of Judgment in words and figures following, to wit:

562 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

MOTION IN ARREST OF JUDGMENT.

Now comes William Molasky, by David Baron, his attorney, and moves in arrest of judgment, and as grounds therefor shows:

1. The indictment and each count thereof fails to state a criminal offense.

2. The alleged offenses charged in each of the counts of the indictment are so lacking in certainty of description and reference to any standard or definition of any crime as to constitute a violation of the fifth and sixth amendments to the constitution of the United States.

3. The court erred in overruling the defendant's demurrer to the indictment.

563 4. The court erred in overruling and dismissing this defendant's amended special plea in bar (immunity plea).

David Baron,

Attorney for said Defendant.

564 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

MOTION IN ARREST OF JUDGMENT.

Now comes Arnold W. Kruse, by Warran Canaday and Joseph Struett, his attorneys, and moves in arrest of judgment, and as grounds therefor shows:

1. The indictment and each count thereof fails to state a criminal offense.

2. The alleged offenses charged in each of the counts of the indictment are so lacking in certainty of description and reference to any standard or definition of any

crime as to constitute a violation of the fifth and sixth amendments to the constitution of the United States.

3. The court erred in overruling the defendant's demurrer to the indictment.

565 4. The court erred in overruling and dismissing this defendant's special plea in bar (immunity plea).

Warren Canady,

Joseph A. Struett,

Attorneys for said Defendant.

566 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

MOTION IN ARREST OF JUDGMENT.

Now comes Lester A. Kruse, by Warren Canaday and Joseph Struett, his attorneys, and moves in arrest of judgment, and as grounds therefor shows:

1. The indictment and each count thereof fails to state a criminal offense.

2. The alleged offenses charged in each of the counts of the indictment are so lacking in certainty of description and reference to any standard or definition of any crime as to constitute a violation of the fifth and sixth amendments to the constitution of the United States.

3. The court erred in overruling the defendant's demurrer to the indictment.

567 4. The court erred in overruling and dismissing this defendant's special plea in bar (immunity plea).

Warren Canady,

Joseph A. Struett,

Attorneys for said defendant.

568 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

MOTION IN ARREST OF JUDGMENT.

Now comes, Defendant, James M. Ragen, by John L. McInerney, his attorney, and moves in arrest of judgment, and as grounds therefor shows:

1. The indictment and each count thereof fails to state a criminal offense.

2. The alleged offenses charged in each of the counts of the indictment are so lacking in certainty of description and reference to any standard or definition of any crime as to constitute a violation of the fifth and sixth amendments to the Constitution of the United States.

3. The court erred in overruling the defendant's demurrer to the indictment.

John L. McInerney,

Attorney for said defendant.

569 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

MOTION IN ARREST OF JUDGMENT.

Now comes defendant, James M. Ragen, Jr., by John L. McInerney, his attorney, and moves in arrest of judgment, and as grounds therefor shows:

1. The indictment and each count thereof fails to state a criminal offense.

2. The alleged offenses charged in each of the counts of the indictment are so lacking in certainty of description and reference to any standard or definition of any crime as to constitute a violation of the Fifth and Sixth Amendments to the Constitution of the United States.

3. The court erred in overruling the defendant's demurrer to the indictment.

570 4. The court erred in overruling this defendant's amended special plea in bar (immunity plea).

John L. McInerney,

Attorney for said defendant.

571 And on, to wit, the 14th day of September A. D. 1940 came the defendant by his attorneys and filed in the Clerk's office of said Court a certain BOND ON APPEAL in words and figures following, to wit:

Filed
Sept. 14,
1940.

572 Know all Men by these Presents, That William Molasky, 2 Aberdeen Place, St. Louis, Mo., State of Missouri, as Principal, and United States Fidelity and Guaranty Company, a Maryland Corporation, 170 West Jackson Blvd., Chicago, Ill., of the County of Cook, State of

Illinois, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand and no/100 Dollars (\$10,000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 13th day of September, in the year of our Lord, One Thousand Nine Hundred and Forty.

Whereas, lately on the 12th day of September, 1940, at the September Term of the District Court of the United States for the Northern District of Eastern Division, in a cause pending in said Court between the United States of America, Plaintiff, and William Molasky, Defendant, a judgment and sentence were rendered against said William Molasky and the said William Molasky has obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit at the City of Chicago thirty days from and after the date thereof, which citation has been duly served, and said appeal is to operate as a supersedeas upon filing of this bond.

Now the condition of said obligation is such, That if the said William Molasky shall appear in person in the United States Circuit Court of Appeals for the Seventh Circuit on the 14th day of September, A. D. 1940, of the October Term, 1940, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Circuit Court of Appeals for the Seventh Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed, and if he shall appear for trial in the District Court of the United States, for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Seventh Circuit, then the above obliga-

tion to be void; otherwise to remain in full force, virtue, and effect.

William Molasky.
United States Fidelity and Guaranty
Company, a Maryland Corporation,
By Edmond J. Moroney,

(Seal

Attorney-in-fact.

Signed and acknowledged to and before me this 14th day of September, 1940.

Christ X. Gunther,
Deputy Clerk.

Approved By:

Holly,

United States District Judge.

Approved:

Mary D. Bailey,

Asst. U. S. Attorney.

573 State of Illinois, }
County of Cook, } ss.

I, E. Thompson, a Notary Public in and for the County and State aforesaid, do hereby certify that Edmond J. Moroney, Attorneys-in-fact of the United States Fidelity and Guaranty Company, who are personally known to me to be the same persons whose names are subscribed in the foregoing instrument, as such Attorneys-in-fact, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act, and as the free and voluntary act of the said United States Fidelity and Guaranty Company for the uses and purposes therein set forth, and caused the corporate seal of the said Company to be thereto attached.

Given under my hand and Notarial seal this 13th day of September, A. D. 1940.

E. Thompson,
Notary Public.

(Seal)

My Commission Expires January 16, 1941.

(Endorsed) District Court of the United States * *
(Caption—31760) * * Bond on Appeal. Filed Sep 14
1940. Hoyt King, Clerk.

Entered
Sept. 14,
1940.

574 And afterwards, to wit, on the 14th day of September, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

575 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Saturday, September 14, A. D. 1940.

Present: Honorable William H. Holly, Judge.

| | |
|--------------------------|--------------|
| United States of America | } No. 31760. |
| vs. | |
| William Molasky | |

On motion of the defendant William Molasky it is Ordered that the appeal bond of said defendant in the sum of Ten Thousand (\$10,000.00) Dollars be and the same is hereby approved.

576 And on, to wit, the 16th day of September, A. D. 1940 came the defendant by his attorneys and filed in the Clerk's office of said Court a certain BOND ON APPEAL in words and figures following, to wit:

577 Know all Men by these Presents, That Lester A. Kruse, 4767 N. Aiton Rd., Miami Beach, Florida, State of Florida, as principal, and United States Fidelity and Guaranty Company, a Maryland Corporation, 170 W. Jackson Blvd., Chicago, Ill., of the County of Cook, State of Illinois, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty and no/100 Dollars (\$250.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of Sep-

tember, in the year of our Lord, One Thousand Nine Hundred and Forty.

Whereas, lately on the 12th day of September, 1940, at the _____ Term of the District Court of the United States for the Northern District of Eastern Division, in a cause pending in said Court between the United States of America, Plaintiff, and Lester A. Kruse, Defendant, a judgment and sentence were rendered against said Lester A. Kruse and the said Lester A. Kruse has obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit at the City of Chicago thirty days from and after the date thereof, which citation has been duly served, and said appeal is to operate as a supersedeas upon filing of this bond.

Now the condition of said obligation is such, That if the said Lester A. Kruse shall appear in person in the United States Circuit Court of Appeals for the Seventh Circuit on the 16th day of September, A. D. 1940, of the October Term, 1940, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Circuit Court of Appeals for the Seventh Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed, and if he shall appear for trial in the District Court of the United States, for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Seventh Circuit, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

Lester A. Kruse.

United States Fidelity and Guaranty
Company, a Maryland Corporation,

By Edmond J. Moroney,

Attorney-in-fact.

(Seal)

Signed and acknowledged to and before me this 16th day of September, 1940.

Christ Gunther,
Deputy Clerk.

Approved By:

Charles E. Woodward,
United States District Judge.

Approved:

Martin Ward,
Asst. U. S. Attorney.

578 (Endorsed) District Court of the United States
• • (Caption—31760) • • Bond on Appeal. Paid
Fee 50¢. Filed Sep 16 1940. Hoyt King, Clerk.

579 And on, to wit, the 16th day of September, A. D.
1940 came the defendant by his attorneys and filed in
the Clerk's office of said Court a certain BOND ON
APPEAL in words and figures following, to wit:

580 Know all Men by these Presents, That Arnold W.
Kruse, 3750 Lake Shore Drive, Chicago, State of Illi-
nois, as principal, and United States Fidelity and Guar-
anty Company, a Maryland Corporation, 179 W. Jackson
Blvd., Chicago, Ill., of the County of Cook, State of Illi-
nois, as sureties, are held and firmly bound unto the United
States of America in the full and just sum of Ten Thousand
and no/100 Dollars (\$10,000.00), to be paid to the United
States of America, to which payment well and truly to be
made we bind ourselves, our heirs, executors, and adminis-
trators, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of Sep-
tember, in the year of our Lord, One Thousand Nine Hun-
dred and Forty.

Whereas, lately on the 12th day of September, 1940, at
the _____ Term of the District Court of the United
States for the Northern District of Illinois, _____
Division, in a cause pending in said Court between the
United States of America, Plaintiff, and Arnold W. Kruse,
Defendant, a judgment and sentence were rendered against
said Arnold W. Kruse and the said Arnold W. Kruse has
obtained an appeal to the United States Circuit Court of
Appeals for the Seventh Circuit from the said United States
District Court to reverse the judgment and sentence in the
aforesaid suit, and a citation directed to the said United

States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit at the City of Chicago thirty days from and after the date thereof, which citation has been duly served, and said appeal is to operate as a supersedeas upon filing of this bond.

Now the condition of said obligation is such, That if the said Arnold W. Kruse shall appear in person in the United States Circuit Court of Appeals for the Seventh Circuit on the 14th day of September, A. D. 1940, of the October Term, 1940, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Circuit Court of Appeals for the Seventh Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed, and if he shall appear for trial in the District Court of the United States, for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Seventh Circuit, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

Arnold W. Kruse (Seal)
United States Fidelity and Guaranty
Company, a Maryland Corporation,
By Edmond J. Moroney,

(Seal)

Attorney-in-fact.

Signed and acknowledged to and before me this 14th day of Sept., 1940.

Christ Gunther,
Deputy Clerk.

Approved by:

Charles E. Woodward,
United States District Judge.

Approved:

William T. Crilly,
Asst. U. S. Attorney.

581 Endorsed: District Court of the United States.
• • (Caption—31760) • • Bond on Appeal. Paid
fee 50¢. Filed Sept. 16, 1940. Hoyt King, Clerk.

Entered
Sept. 16,
1940.

582 And afterwards, to wit, on the 16th day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

583 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Monday, September 16, A. D. 1940.

Present: Honorable Charles E. Woodward, Judge.

United States of America

vs.

Arnold W. Kruse, Lester A. Kruse.

} No. 31760.

This day comes the defendant Arnold W. Kruse by his attorney and presents herein his bond on appeal in the sum of ten thousand (\$10,000.00) dollars comes also the defendant Lester A. Kruse and presents herein his bond on appeal in the sum of two hundred and fifty (\$250.00) dollars which bonds are approved and signed by the Court and ordered by the Court to be filed by the Clerk of this Court.

Filed
Sept. 16,
1940.

584 And on, to wit, the 16th day of September, A. D. 1940 came the defendant by his attorneys and filed in the Clerk's office of said Court certain BOND ON APPEAL in words and figures following, to wit:

585 Know all Men by these Presents, That James M. Ragen, Sr., 10756 South Seeley Ave., Chicago, State of Illinois, as principal, and United States Fidelity and Guaranty Company, a Maryland Corporation, 170 West Jackson Blvd., Chicago, Ill., of the County of Cook, State of Illinois, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand and no/100 Dollars (\$10,000.00), to be paid to

the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of Sept., in the year of our Lord, One Thousand Nine Hundred and Forty.

Whereas, lately on the 12th day of September, 1940, at the September Term of the District Court of the United States for the Northern District of Eastern Division, in a cause pending in said Court between the United States of America, Plaintiff, and James M. Ragen, Sr., Defendant, a judgment and sentence were rendered against said James M. Ragen, Sr., and the said James M. Ragen, Sr., has obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit at the City of Chicago thirty days from and after the date thereof, which citation has been duly served, and said appeal is to operate as a supersedeas upon filing of this bond.

Now the condition of said obligation is such, That if the said James M. Ragen, Sr. shall appear in person in the United States Circuit Court of Appeals for the Seventh Circuit on the 14th day of September, A. D. 1940, of the October Term, 1940, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Circuit Court of Appeals for the Seventh Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed, and if he shall appear for trial in the District Court of the United States, for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit

Court of Appeals for the Seventh Circuit, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

James M. Ragen, Sr. (Seal)
 United States Fidelity and Guaranty
 Company, a Maryland Corporation,
 By Edmond J. Moroney,

(Seal)

Attorney-in-fact.

Signed and acknowledged to and before me this 14th day of September, 1940.

Christ Gunther,
Deputy Clerk.

Approved by:

Charles E. Woodward,
United States District Judge.

Approved:

William T. Crilly,
Asst. U. S. Attorney.

586 Endorsed: District Court of the United States.
 * * (Caption—31760) * * Bond on Appeal. Paid
 fee 50¢. Filed Sept. 16, 1940, Hoyt King, Clerk.

Filed
 Sept. 16,
 1940.

587 And on, to wit, the 16th day of September, A. D. 1940, came the defendant by his attorneys and filed in the Clerk's office of said Court certain BOND ON APPEAL in words and figures following, to wit:

588 Know all Men by these Presents, That James M. Ragen, Jr., 1420 Lake Shore Drive, Chicago, Ill., State of Illinois, as principal, and United States Fidelity and Guaranty Company, a Maryland Corporation, of the County of Cook, State of Illinois, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty and no/100 Dollars (\$250.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of Sept., in the year of our Lord, One Thousand Nine Hundred and Forty.

Whereas, lately on the 12th day of September, 1940, at the Term of the District Court of the United States for the Northern District, Eastern Division, in a cause pending in said Court between the United States of America, Plaintiff, and James M. Ragen, Jr., Defendant, a judgment and sentence were rendered against said James M. Ragen, Jr. and the said James M. Ragen, Jr. has obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit at the City of Chicago thirty days from and after the date thereof, which citation has been duly served, and said appeal is to operate as a supersedeas upon filing of this bond.

Now the condition of said obligation is such, That if the said James M. Ragen, Jr. shall appear in person in the United States Circuit Court of Appeals for the Seventh Circuit on the 14th day of Sept., A. D. 1940, of the October Term, 1940, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Circuit Court of Appeals for the Seventh Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed, and if he shall appear for trial in the District Court of the United States, for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Seventh Circuit, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

James M. Ragen, Jr. (Seal)
United States Fidelity and Guaranty
Company, a Maryland Corporation,
By Edmond J. Moroney,

(Seal)

Attorney-in-fact.

Signed and acknowledged to and before me this 14th day of Sept., 1940.

Christ Gunther,
Deputy Clerk.

Approved by:
Charles E. Woodward,
United States District Judge.

Approved:
William T. Crilly,
Asst. U. S. Attorney.

589 Endorsed: District Court of the United States.
• • (Caption—31760) • • Bond on Appeal. Paid
fee 50¢. Filed Sept. 16, 1940, Hoyt King, Clerk.

Filed
Sept. 16,
1940.

590 And on, to wit, the 16th day of September, A. D.
1940, came the defendants by their attorneys and filed
in the Clerk's office of said Court certain Notices of Appeal
in words and figures following, to wit:

591 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

United States of America

vs.

William Molasky, Arnold W. Kruse,
Lester A. Kruse, James M. Ragen, James M. Ragen, Jr.,
and The Consensus Publishing
Company, an Illinois corporation.

Indictment No. 31760.

NOTICE OF APPEAL.

Name and address of Appellant:

Lester A. Kruse,
3750 Lake Shore Drive,
Chicago, Illinois.

Names and addresses of Appellant's Attorneys:

Warren Canaday,
10 South La Salle Street,
Chicago, Illinois.
Joseph A. Struett,
141 West Jackson Boulevard,
Chicago, Illinois.

Offense:

Wilfully and knowingly attempting to evade and defeat income taxes imposed on Consensus Publishing Company, a corporation, for the years 1933 to 1936, both inclusive; Conspiracy to wilfully and knowingly attempt to evade and defeat income taxes imposed on the Consensus Publishing Company, a corporation, for the years 1929 to 1936, both inclusive.

Date of Judgment: September 12, 1940.

Brief description of judgment or sentence:

A fine of One Thousand Dollars.

Name of prison where now confined, if not on bail:

Out on bail.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the judgment above mentioned on the grounds set forth below.

Lester A. Kruse,

Appellant.

By Warren Canaday,

Joseph A. Struett,

His Attorneys.

Dated: September 14, 1940.

592

Grounds for Appeal.

1. The Court erred in denying and dismissing appellant's plea in bar to the indictment.

2. The indictment and each count thereof fail to state a criminal offense for a violation of any statute of the United States.

3. There was a fatal variance between the evidence offered by the government and in charges of the indictment and each count thereof.

4. The evidence offered by the government did not sustain the charges of the indictment.

5. The Court erred in not sustaining appellant's motion for a directed verdict at the conclusion of the government's evidence.

6. The Court erred in not sustaining appellant's motion for a directed verdict at the conclusion of all the evidence.

7. There was no substantial evidence in the record that appellant violated any of the provisions of the Internal

Revenue laws or was guilty of any of the offenses charged in the indictment or any counts thereof.

8. The evidence offered by the government wholly failed to establish the charges of the indictment or the guilt of appellant under any charges of said indictment.

9. The instructions of the Court were erroneous in that they in effect permitted the jury to speculate and conjure as to a violation of a federal law without any evidence in the record to establish such violation.

10. The trial court in its instructions submitted the case to the jury on an erroneous theory of law and fact.

593 11. The verdict and judgment were against the law and the evidence.

(Appellant hereby reserves the privilege to file detailed assignments of error, as provided in Rule IX of the Circuit Court of Appeals, for the Seventh Circuit, and to include in said assignment of errors, all or any part of the above grounds, as well as others which may appropriately appear.)

Received a copy of the above and foregoing Notice of Appeal this 16th day of September, A. D. 1940.

William J. Campbell,
U. S. Attorney.

Filed
Sept. 16,
1940.

594 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

United States of America,

vs.

William Molasky, Arnold W.
Kruse, Lester A. Kruse, James
M. Ragen, James M. Ragen, Jr.,
and The Consensus Publishing
Company, an Illinois corpora-
tion.

} Indictment
No. 31760.

NOTICE OF APPEAL.

Name and address of Appellant: Arnold W. Kruse,
3750 Lake Shore Drive, Chicago, Illinois.

Names and addresses of Appellant's Attorneys: War-
ren Canaday, 10 South La Salle Street, Chicago, Illinois.

Joseph A. Struett, 141 West Jackson Boulevard, Chicago, Illinois.

Offense: Wilfully and knowingly attempting to evade and defeat income taxes imposed on Consensus Publishing Company, a corporation, for the years 1933 to 1936, both inclusive; Conspiracy to wilfully and knowingly attempt to evade and defeat income taxes imposed on the Consensus Publishing Company, a corporation, for the years 1929 to 1936, both inclusive.

Date of Judgment: September 12, 1940.

Brief description of judgment or sentence: Imprisonment of eighteen months in a penitentiary to be designated by the Attorney General, and a fine of Ten Thousand Dollars.

Name of prison where now confined, if not on bail: Out on bail.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the judgment above mentioned on the grounds set forth below.

Arnold W. Kruse,

Appellant,

By Warren Canaday,

Joseph A. Struett,

His Attorneys.

Dated: September 14, 1940.

595

Grounds for Appeal.

1. The Court erred in denying and dismissing appellant's plea in bar to the indictment.
2. The indictment and each count thereof fail to state a criminal offense for a violation of any statute of the United States.
3. There was a fatal variance between the evidence offered by the government and in charges of the indictment and each count thereof.
4. The evidence offered by the government did not sustain the charges of the indictment.
5. The Court erred in not sustaining appellant's motion for a directed verdict at the conclusion of the government's evidence.

6. The Court erred in not sustaining appellant's motion for a directed verdict at the conclusion of all the evidence.

7. There was no substantial evidence in the record that appellant violated any of the provisions of the Internal Revenue laws or was guilty of any of the offenses charged in the indictment or any counts thereof.

8. The evidence offered by the government wholly failed to establish the charges of the indictment or the guilt of appellant under any charges of said indictment.

9. The instructions of the Court were erroneous in that they in effect permitted the jury to speculate and conjure as to a violation of a federal law without any evidence in the record to establish such violation.

10. The trial court in its instructions submitted the case to the jury on an erroneous theory of law and fact.
596 11. The verdict and judgment were against the law and the evidence.

(Appellant hereby reserves the privilege to file detailed assignments of error, as provided in Rule IX of the Circuit Court of Appeals, for the Seventh Circuit, and to include in said assignment of errors, all or any part of the above grounds, as well as others which may appropriately appear.)

Received a copy of the above and foregoing Notice of Appeal this 16th day of September, A. D. 1940.

William J. Campbell,

U. S. Attorney.

Notice of Appeal of William Molasky.

273

597 IN THE DISTRICT COURT OF THE UNITED STATES,

Filed
Sept. 16,
1940.

For the Northern District of Illinois,

Eastern Division.

United States of America,

vs.

William Molasky, Arnold W.
Kruse, Lester A. Kruse, James
M. Ragen, James M. Ragen, Jr.,
and The Consensus Publishing
Company, an Illinois corporation.

Indictment
No. 31760.

NOTICE OF APPEAL.

Filed: Sept. 16, 1940.

Name and address of Appellant: William Molasky, 2
Aberdeen Place, St. Louis, Missouri.

Name and address of Appellant's Attorney: David
Baron, 208 North Broadway, St. Louis, Missouri.

Offense: Wilfully and knowingly attempting to evade
and defeat income taxes imposed on Consensus Publish-
ing Company, a corporation, for the years 1933 to 1936,
both inclusive; Conspiracy to wilfully and knowingly at-
tempt to evade and defeat income taxes imposed on the
Consensus Publishing Company, a corporation, for the
years 1929 to 1936, both inclusive.

Date of Judgment: September 12, 1940.

Brief Description of judgment or sentence: Imprison-
ment of one year and one day in a penitentiary to be
designated by the Attorney General, and a fine of Ten
Thousand Dollars.

Name of prison where now confined, if not on bail: Out
on bail.

I, the above-named Appellant, hereby appeal to the
United States Circuit Court of Appeals for the Seventh
Circuit from the judgment above mentioned on the grounds
set forth below.

William Molasky,

Appellant,

By David Baron,

His Attorney.

Dated: September 14, 1940.

Grounds of Appeal.

1. The court erred in dismissing the amended special plea in bar of this defendant, William Molasky, (immunity plea) and in sustaining the Government's motion to dismiss said plea without permitting said defendant to offer evidence in support of said special plea.

2. There was failure of proof as to this defendant in that there was no evidence whatsoever that he ever saw the income tax returns, or copies thereof, which were filed in behalf of the Consensus Publishing Company for the years in question with the United States, or saw the company's records on which said returns for said years were based, or that he was ever consulted or had any conversation, conference or correspondence with any person as to the returns to be made by the company, or what was to appear in same, or as to any of the deductions that were to be taken in said returns, or the manner in which any payments that were made to him, or any other person, were to be treated for tax purposes, or entered on the books of the company, or that he in any way assented to the manner in which the Company was to make its income tax returns to the United States for said years, or as to the amounts to be paid as income tax to the United States for said years, or that prior to the time of the return of the indictment in this case, he knew on what basis the company had made, or intended to make its said income tax returns to the United States for said years.

In short, there was no evidence of any kind, nature or description tending even remotely to the suspicion that this defendant at any time knew anything about the income taxes or income tax returns of the Consensus Publishing Company, or that he had anything to do therewith, or in any way conspired in regard thereto.

3. The court erred in denying this defendant's motion for a directed verdict in his favor at the close of the Government's evidence and at the close of all of the evidence (no evidence having been offered on behalf of any defendant), in that the evidence was wholly insufficient to go to the jury on the question of the guilt of this defendant under any of the charges in any count of the indictment.

4. The court erred in its instructions to the jury in that it in effect permitted the jury to decide this case

upon mere conjecture and speculation without any evidence from which they could determine the guilt or innocence of this defendant.

690 5. The first four counts of the indictment are similar and allege that all of the defendants wilfully attempted to defeat and evade the income tax of the Consensus Publishing Company for the calendar years 1933, 1934, 1935 and 1936, respectively, by the sole means of causing the company to deduct from its gross income as commissions the amounts paid to the individual defendants in each year. There is no allegation in any of the first four counts that the commissions paid were excessive, or were not earned, nor is any allegation referable to their illegality even remotely suggested. No criminal offense is thus alleged in any of the first four counts.

6. The fifth count alleges a conspiracy and charges that the individual defendants, with the intention of having the Consensus Publishing Company defeat and evade payment of income taxes due the United States for the years 1929 to 1936, both inclusive, caused certain definite sums of money to be paid to them by said company as compensation for services which were not rendered and were not intended to be rendered.

The court charged the jury that the defendants were entitled to reasonable compensation for such services as they rendered and that the shareholders were entitled to a division of the profits of the Company in the way of dividends, and that it was for the jury to decide 601 whether the payments made to the individual defendants, or a substantial portion thereof, were a distribution of profits rather than compensation for services, and that it was not necessary for the Government to prove that all of the sums so distributed to the defendants were profits; but that it was sufficient if the jury found beyond a reasonable doubt that the defendants intentionally diverted profits of the company in the amounts charged in the indictment, or substantial parts thereof, thereby diverting such sums from the form of profits and receiving such sums in the form of commissions.

This charge did not limit the jury's inquiry to the only question presented for its decision, namely, whether or not the defendants performed any services whatever. It was not within the province of the jury under the indictment, or under the evidence submitted to determine what

the value of the services of the individual defendants was. As soon as it appeared from the evidence that any services were rendered, the charge in count five of the indictment failed. The Government having disapproved the allegations contained in count five, thereby made it unnecessary for the defendants to establish that they performed any services or the value thereof. This affirmative evidence of the Government that the defendants in fact performed services as well established the innocence of the defendants with respect to the first four counts of the indictment, because the only theory of the Government (not alleged in the indictment) was that the commissions were paid for services not rendered. The Revenue Act specifically permits deductions from gross income for compensation paid for services. The regulations of the Bureau of Internal Revenue of the Treasury Department state that contracts for contingent compensation should be scrutinized, but that contingent compensation should be allowed as a deduction from net income to the extent that such compensation is reasonable, and further describe the circumstances where compensation is to be treated as dividends in instances where the recipients thereof are stockholders in a corporation. The regulations provide:

"Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows:

(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. (a) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services, and the excessive payments correspond to bear a close relationship to the stock holdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribu-

tion of earnings upon the stock. (b) An ostensible salary may be in part payment for property. This may occur, for example, where a partnership sells out to a corporation, the former partners agreeing to continue in the service of the corporation. In such case it may be found that the salaries of the former partners are not merely for services but in part constitute payment for the transfer of their business.

(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. Generally speaking, if contingent compensation is paid pursuant to a free bargain between the employer and the individual made before the services are rendered, not influenced by any consideration on the part of the employer other than that of securing on fair and advantageous terms the services of the individual, it should be allowed as a deduction even though in the actual working out of the contract it may prove to be greater than the amount which would ordinarily be paid.

(3) In any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances. It is in general just to assume that a reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned."

604 Received a copy of the above and foregoing Notice of Appeal, together with Grounds for Appeal thereto attached this _____ day of September, 1940.

United States Attorney.

605 The evidence introduced by the Government was insufficient to sustain the charges in any count of the indictment, but on the contrary, established the innocence of this defendant. The Government proved that services had been rendered to the Consensus Publishing Company by each one of the individual defendants, but

introduced no evidence from which the jury could determine the amount of compensation to which the individual defendants were reasonably entitled for such services rendered. The Government therefore failed to prove that such services were worth less than the amount of compensation received therefor and thus failed to establish that the deductions from the gross income of the company for commissions paid were greater than the amount allowed by the Revenue Act and the regulations thereunder.

7. This case was submitted to the jury on the erroneous theory that the jury was to determine whether or not the commissions deducted by the Consensus Publishing Company from its gross income for the years in question and paid to the individual defendants were greater than was reasonable compensation for the services rendered by them. This permitted the jury to adopt its own standard as to whether or not a crime had been committed. Such a delegation of power violated the due process clause of the Fourteenth Amendment to the

606 Constitution. To hold that the provisions of the Revenue Act on which the charges in the indictment are based permit such delegation of power, would make such provisions violative of the Fifth and Sixth Amendments to the Constitution in that they afforded no ascertainable standard of guilt and were not sufficiently explicit to inform those subject to such provisions as to what conduct on their part would render them liable to the penalties they provide.

8. The court erred in submitting the case to the jury upon issues not set forth in the indictment, which issues constitute a fundamental variance from the charges contained in said indictment.

David Baron,
Attorney for Defendant.
William Molasky.

607 Received a copy of the above and foregoing Notice of Appeal, together with Grounds for Appeal thereto attached this 16th day of September, 1940.

(Sgd.) William J. Campbell,
United States Attorney.
By Austin Hall,
Ass't United States Attorney.

608 IN THE DISTRICT COURT OF THE UNITED STATES,

Filed
Sept. 16,
1940.

For the Northern District of Illinois,

Eastern Division.

| | | |
|--|---|--------------------------|
| United States of America, | } | Indictment No. 31760. |
| <i>vs.</i> | | |
| William Molasky, Arnold W. | | |
| Kruse, Lester A. Kruse, James | | |
| M. Ragen, James M. Ragen, Jr., and The Consensus Publishing Company, an Illinois corpora- tion. | | |

NOTICE OF APPEAL.

Name and address of Appellant: James M. Ragen,
10756 South Seeley Avenue, Chicago, Illinois.

Name and address of Appellant's Attorney: John L.
McInerney, 1 North LaSalle Street, Chicago, Illinois.

Offense: Wilfully and knowingly attempting to evade
and defeat income taxes imposed on Consensus Publish-
ing Company, a corporation, for the years 1933 to 1936,
both inclusive; Conspiracy to wilfully and knowingly at-
tempt to evade and defeat income taxes imposed on the
Consensus Publishing Company, a corporation, for the
years 1929 to 1936, both inclusive.

Date of Judgment: September 12, 1940.

Brief description of judgment or sentence: Imprison-
ment of one year and one day in a penitentiary to be
designated by the Attorney General, and a fine of Ten
Thousand Dollars.

Name of prison where now confined, if not on bail: Out
on bail.

I, the above-named Appellant, hereby appeal to the
United States Circuit Court of Appeals for the Seventh
Circuit from the judgment above mentioned on the
grounds set forth below.

James M. Ragen,
Appellant.

By John L. McInerney,
His Attorney.

Dated: September 14, 1940.

609 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

GROUNDS OF APPEAL.

1. The court erred in denying this defendant's motion for a directed verdict in his favor at the close of the Government's evidence and at the close of all of the evidence (no evidence having been offered on behalf of any defendant), in that the evidence was wholly insufficient to go to the jury on the question of the guilt of this defendant under any of the charges in any count of the indictment.

2. The court erred in its instructions to the jury in that it in effect permitted the jury to decide this case upon mere conjecture and speculation without any evidence from which they could determine the guilt or innocence of this defendant.

3. The first four counts of the indictment are similar and allege that all of the defendants wilfully attempted to defeat and evade the income tax of the Consensus Publishing Company for the calendar years 1933, 1934, 1935 and 1936 by the sole means of the company deducting from its gross income as commissions the amounts paid to the individual defendants in each year. There is no allegation in any of the first four counts that the commissions paid were excessive, or were not earned, nor is any allegation referable to their illegality even remotely suggested. No criminal offense is thus alleged in any of the first four counts.

4. The fifth count alleges a conspiracy and charges that the individual defendants, with the intention of having the Consensus Publishing Company defeat and evade payment of income taxes due the United States for the years 1929 to 1936, both inclusive, caused certain definite sums of money to be paid to them by said company as compensation for services which were not rendered and were not intended to be rendered.

The court charged the jury that the defendants were entitled to reasonable compensation for such services as they rendered and that the shareholders were entitled to a division of the profits of the Company in the way of dividends, and that it was for the jury to decide whether the payments made to the individual defendants, or a sub-

stantial portion thereof, were a distribution of profits rather than compensation for services, and that it was 611 not necessary for the Government to prove that all of the sums so distributed to the defendants were profits; but that it was sufficient if the jury found beyond a reasonable doubt that the defendants intentionally diverted profits of the company in the amounts charged in the indictment, or substantial parts thereof, thereby diverting such sums from the form of profits and receiving such sums in the form of commissions.

This charge did not limit the jury's inquiry to the only question presented for its decision, namely, whether or not the defendants performed any services whatever. It was not within the province of the jury under the indictment, or under the evidence submitted to determine what the value of the services of the individual defendants was. As soon as it appeared from the evidence that any services were rendered, the charge in count five of the indictment failed. The Government having disproved the allegations contained in count five, thereby made it unnecessary for the defendants to establish that they performed any services or the value thereof. This affirmative evidence of the Government that the defendants in fact performed services as well established the innocence of the defendants with respect to the first four counts of the indictment, because the only theory of the Government (not alleged in the indictment) was that the 612 commissions were paid for services not rendered.

The Revenue Act specifically permits deductions from gross income for compensation paid for services. The regulations of the Bureau of Internal Revenue of the Treasury Department state that contracts for contingent compensation should be scrutinized, but that contingent compensation should be allowed as a deduction from net income to the extent that such compensation is reasonable, and further describe the circumstances where compensation is to be treated as dividends in instances where the recipients thereof are stockholders in a corporation. The regulations provide:

"Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments

purely for services. This test and its practical application may be further stated and illustrated as follows:

(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. (A) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services, and the excessive payments correspond or bear a close relationship to the stock holdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock. (b) An ostensible salary may be in part payment for property. This may occur, 613 for example, where a partnership sells out to a corporation, the former partners agreeing to continue in the service of the corporation. In such a case it may be found that the salaries of the former partners are not merely for services but in part constitute payment for the transfer of their business.

(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. Generally speaking, if contingent compensation is paid pursuant to a free bargain between the employer and the individual made before the services are rendered, not influenced by any consideration on the part of the employer other than that of securing on fair and advantageous terms the services of the individual, it should be allowed as a deduction even though in the actual working out of the contract it may prove to be greater than the amount which would ordinarily be paid.

(3) In any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances. It is in general just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances. The circumstances to be taken into consideration are those existing at the date when the

contract for services was made, not those existing at the date when the contract is questioned."

The evidence introduced by the Government was insufficient to sustain the charges in any count of the indictment, but on the contrary, established the innocence of this defendant. The Government proved that serv-

ices had been rendered to the Consensus Publishing 614 Company by each one of the individual defendants,

but introduced no evidence from which the jury could determine the amount of compensation to which the individual defendants were reasonably entitled for such services rendered. The Government therefore failed to prove that such services were worth less than the amount of compensation received therefor, and thus failed to establish that the deductions from the gross income of the company for commissions paid were greater than the amount allowed by the Revenue Act and the regulations thereunder, or were in law or in fact dividends, or in any manner violated the Revenue Acts.

5. There was failure of proof as to this defendant in that there was no evidence whatsoever that he ever saw the income tax returns or copies thereof which were filed on behalf of the Consensus Publishing Company for the years in question with the United States or saw the company's records on which said returns for said years were based, or that he was ever consulted or had any conversation, conference or correspondence with any person as to the returns to be made by the company, or what was to appear in same, or as to any of the deductions that were to be taken in said returns, or the manner in which any payments that were made to him, or any other person, were to be treated for tax purposes, or entered on the books of the company, or that he in any way assented to the manner in which the Company was

to make its income tax returns to the United States 615 for said years, or as to the amounts to be paid as income tax to the United States for said years, or that prior to the time of the return of the indictment in this case, he knew on what basis the company had made, or intended to make its said income tax returns to the United States for said years.

In short, there was no evidence of any kind, nature or description tending even remotely to the suspicion that this defendant at any time knew anything about the income taxes or income tax returns of the Consensus

Publishing Company, or that he had anything to do therewith, or in any way conspired in regard thereto, or that he in any way knew that a conspiracy in regard thereto existed, if there was one, or that he knew such a conspiracy was unlawful, if there was one. No evidence shows this defendant agreed to or participated in any conspiracy in its beginning, or joined any conspiracy already begun.

6. The evidence clearly establishes that this defendant left the service of the Consensus Publishing Company in April, 1931, and had no connection whatsoever with its income tax returns, directly or indirectly, for any period thereafter. In fact, there was no evidence of any kind that this defendant ever knew of income taxes of the Company from 1929 to 1936, inclusive, and for this reason, among others, the court committed grievous error in submitting to the jury the income tax returns 616 of this defendant, James M. Ragen, for the years 1932, 1933, 1934, 1935 and 1936.

7. This case was submitted to the jury on the erroneous theory that the jury was to determine whether or not the commissions deducted by the Consensus Publishing Company from its gross income for the years in question and paid to the individual defendants were greater than was reasonable compensation for the services rendered by them.

8. The court erred in submitting the case to the jury upon issues not set forth in the indictment, which issues constitute a fundamental variance from the charges contained in said indictment.

(Sgd.) John L. McInerney,
Attorney for Defendant,
James M. Ragen.

617 Received a copy of the above and foregoing Notice of Appeal, together with Grounds for Appeal thereto attached this 16th day of September, 1940.

Wm. T. Campbell,
United States Attorney.

618 IN THE DISTRICT COURT OF THE UNITED STATES

Filed
Sept. 16,
1940.

For the Northern District of Illinois,

Eastern Division.

United States of America

vs.

William Molasky, Arnold W.
Kruse, Lester A. Kruse, James
M. Ragen, James M. Ragen, Jr.,
and The Consensus Publishing
Company, an Illinois corpora-
tion.

} Indictment
No. 31760.

NOTICE OF APPEAL.

Name and address of Appellant:

James M. Ragen, Jr.,
1420 Lake Shore Drive,
Chicago, Illinois.

Name and address of Appellant's Attorney:

John L. McInerney,
1 North La Salle Street,
Chicago, Illinois.

Offense:

Wilfully and knowingly attempting to evade and defeat income taxes imposed on Consensus Publishing Company, a corporation, for the years 1933 to 1936, both inclusive; Conspiracy to wilfully and knowingly attempt to evade and defeat income taxes imposed on the Consensus Publishing Company, a corporation, for the years 1929 to 1936, both inclusive.

Date of Judgment: September 12, 1940.

Brief description of judgment or sentence:

Fine of One Thousand Dollars and committed to jail until same is paid.

Name of prison where now confined, if not on bail:

Out on bail.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Seventh

Circuit from the judgment above mentioned on the grounds set forth below.

James M. Ragen, Jr.,
Appellant.

By John L. McInerney,
His Attorney.

Dated: September 14, 1940.

619 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

• GROUNDS OF APPEAL.

1. The court erred in denying this defendant's motion for a directed verdict in his favor at the close of the Government's evidence and at the close of all of the evidence (no evidence having been offered on behalf of any defendant), in that the evidence was wholly insufficient to go to the jury on the question of the guilt of this defendant under any of the charges in any count of the indictment.

2. The court erred in its instructions to the jury in that it in effect permitted the jury to decide this case upon mere conjecture and speculation without any evidence from which they could determine the guilt or innocence of this defendant.

3. The first four counts of the indictment are similar and allege that all of the defendants wilfully attempted to defeat and evade the income tax of the Consensus Publishing Company for the calendar years 1933, 1934, 1935 and 1936 by the sole means of the company deducting from its gross income as commissions the amounts paid to the individual defendants in each year. There is no allegation in any of the first four counts that the commissions paid were excessive, or were not earned, nor is any allegation referable to their illegality even remotely suggested. No criminal offense is thus alleged in any of the first four counts.

4. The fifth count alleges a conspiracy and charges that the individual defendants, with the intention of having the Consensus Publishing Company defeat and evade payment of income taxes due the United States for the years 1929 to 1936, both inclusive, caused certain definite sums of money to be paid to them by said company as compensa-

tion for services which were not rendered and were not intended to be rendered.

The court charged the jury that the defendants were entitled to reasonable compensation for such services as they rendered and that the shareholders were entitled to a division of the profits of the Company in the way of dividends, and that it was for the jury to decide whether the payments made to the individual defendants, or a substantial portion thereof, were a distribution of profits rather than compensation for services, and that it was 621 not necessary for the Government to prove that all of the sums so distributed to the defendants were profits; but that it was sufficient if the jury found beyond a reasonable doubt that the defendants intentionally diverted profits of the company in the amounts charged in the indictment, or substantial parts thereof, thereby diverting such sums from the form of profits and receiving such sums in the form of commissions.

This charge did not limit the jury's inquiry to the only question presented for its decision, namely, whether or not the defendants performed any services whatever. It was not within the province of the jury under the indictment, or under the evidence submitted to determine what the value of the services of the individual defendants was. As soon as it appeared from the evidence that any services were rendered, the charge in count five of the indictment failed. The Government having disproved the allegations contained in count five, thereby made it unnecessary for the defendants to establish that they performed any services or the value thereof. This affirmative evidence of the Government that the defendants in fact performed services as well established the innocence of the defendants with respect to the first four counts of the indictment, because the only theory of the Government (not alleged in the indictment) was that the commissions were paid for services not rendered. The Revenue Act specifically permits 622 deductions from gross income for compensation paid for services. The regulations of the Bureau of Internal Revenue of the Treasury Department state that contracts for contingent compensation should be scrutinized, but that contingent compensation should be allowed as a deduction from net income to the extent that such compensation is reasonable, and further describe the circumstances where compensation is to be treated as dividends in in-

stances where the recipients thereof are stockholders in a corporation. The regulations provide:

"Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows:

(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. (a) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services, and the excessive payments correspond or bear a close relationship to the stock holdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock. (b) An ostensible salary may be in part payment for property. This may occur, for example, where a partnership sells out to a corporation, the former 623 partners agreeing to continue in the service of the corporation. In such a case it may be found that the salaries of the former partners are not merely for services but in part constitute payment for the transfer of their business.

(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings in the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. Generally speaking, if contingent compensation is paid pursuant to a free bargain between the employer and the individual made before the services are rendered, not influenced by any consideration on the part of the employer other than that of securing on fair and advantageous terms the services of the individual, it should be allowed as a deduction even though in the actual working out of the contract it may prove to be greater than the amount which would ordinarily be paid.

(3) In any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances. It is in general just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned."

The evidence introduced by the Government was insufficient to sustain the charges in any count of the indictment, but on the contrary, established the innocence of this defendant. The Government proved that services had been rendered to the Consensus Publishing Company 624 by each one of the individual defendants, but introduced no evidence from which the jury could determine the amount of compensation to which the individual defendants were reasonably entitled for such services rendered. The Government therefore failed to prove that such services were worth less than the amount of compensation received therefor, and thus failed to establish that the deductions from the gross income of the company for commissions paid were greater than the amount allowed by the Revenue Act and the regulations thereunder, or were in law or in fact dividends, or in any manner violated the Revenue Acts.

5. There was failure of proof as to this defendant in that there was no evidence whatsoever that he ever saw the income tax returns or copies thereof which were filed on behalf of the Consensus Publishing Company for the years in question with the United States or saw the company's records on which said returns for said years were based, or that he was ever consulted or had any conversation, conference or correspondence with any person as to the returns to be made by the company, or what was to appear in same, or as to any of the deductions that were to be taken in said returns, or the manner in which any payments that were made to him, or any other person, were to be treated for tax purposes, or entered on the books of the company, or that he in any way assented to the manner in which the Company was to make its income tax returns to the United States for said years, or as 625 to the amounts to be paid as income tax to the United States for said years, or that prior to the time of the return of the indictment in this case, he knew on what

basis the company had made, or intended to make its said income tax returns to the United States for said years.

In short, there was no evidence of any kind, nature or description tending even remotely to the suspicion that this defendant at any time knew anything about the income taxes or income tax returns of the Consensus Publishing Company, or that he had anything to do therewith, or in any way conspired in regard thereto, or that he in any way knew that a conspiracy in regard thereto existed, if there was one, or that he knew such a conspiracy was unlawful, if there was one. No evidence shows this defendant agreed to or participated in any conspiracy in its beginning, or joined any conspiracy already begun.

6. The court erred in dismissing the special plea in bar of this defendant (immunity plea) and in sustaining the Government's motion to dismiss said plea without permitting said defendant to offer evidence in support of said special plea.

7. This case was submitted to the jury on the erroneous theory that the jury was to determine whether or not 626 the commissions deducted by the Consensus Publishing Company from its gross income for the years in question and paid to the individual defendants were greater than was reasonable compensation for the services rendered by them.

8. The court erred in submitting the case to the jury upon issues not set forth in the indictment, which issues constitute a fundamental variance from the charges contained in said indictment.

John L. McInerney,
*Attorney for defendant, James
M. Ragen, Jr.*

627 Received a copy of the above and foregoing Notice of Appeal, together with Grounds for Appeal thereto attached this 16th day of September, 1940.

(Sgd) Wm. J. Campbell,
United States Attorney.

Entered
Sept. 16,
1940.

628 And afterwards, to wit, on the 16th day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

629 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Monday, September 16, A. D. 1940.

Present: Honorable Charles E. Woodward, Judge.

| | |
|-------------------------------|--------------|
| United States of America | } No. 31760. |
| vs. | |
| James M. Ragen, Sr., James M. | |
| Ragen, Jr. | |

This day comes the defendant James M. Ragen, Sr., by his attorney and presents herein his bond on appeal in the sum of Ten Thousand (\$10,000.00) dollars comes also the defendant James M. Ragen, Jr., and presents herein his bond on appeal in the sum of Two Hundred and Fifty (\$250.00) dollars which bonds are approved and signed by the Court and ordered by the Court to be filed by the Clerk of this Court.

630 And afterwards, to wit, on the 23rd day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

Entered
Sept. 23,
1940.

631 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

United States of America

vs.

William Molasky, A r n o l d W. }
Kruse, Lester A. Kruse, James } Indictment
M. Ragen, James M. Ragen, Jr., } No. 31760.
and The Consensus Publishing }
Company, an Illinois corporation. }

ORDER.

On motion of the defendants,

It Is Hereby Ordered, Adjudged and Decreed that the original Bills of Exceptions filed by the defendants on December 20, 1939 and on February 14, 1940 may be included in the original record on appeal in lieu of copies thereof.

Dated, September 23, A. D. 1940.

Enter:

Igoe,
Judge.

O. K.

Austin Hall,
Ass't U. S. Atty.

632 And afterwards, to wit, on the 24th day of September 24, 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter C. Lindley, District Judge, appears the following entry, to wit:

633 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—31760) • •

Entered
Sept. 24,
1940.

ORDER.

Lindley, Judge.

The Clerk of this court has heretofore notified me as trial judge that the defendants have filed in his office, notice of appeal pursuant to the rules of the Supreme Court of the United States, applicable to appeals in criminal cases. The respective parties by counsel have submitted to the court their respective suggestions concerning the fixing of time for the filing of bill of exceptions and such other matters as may be proper under Rule 7 of said rules.

The documentary evidence submitted at the trial of this cause is voluminous and it seems to me that the period requested by defendants for filing bill of exceptions is not unreasonable. In view of that circumstance, accordingly it is ordered by the court that the bill of exceptions be filed within sixty days from the 24th day of September, A. D. 1940; that defendants submit their proposed bill of exceptions to the United States Attorney not less than fifteen days before expiration of said period. The court reserves jurisdiction to settle the bill of exceptions prior to the time above fixed.

Entered this 24th day of September, A. D. 1940.

Walter C. Lindley,
Judge.

634 And on, to wit, the 24th day of September A. D. 1940 came the defendants by their attorneys and filed in the Clerk's office of said Court certain Notice and Praecept for Record in words and figures following, to wit:

Filed 635 IN THE DISTRICT COURT OF THE UNITED STATES.
 Sept. 24, 1940. * * (Caption—31760) * *

NOTICE.

To: William J. Campbell,
 United States District Attorney,
 450 U. S. Court House,
 Chicago, Illinois.

Please Take Notice that we shall this day file with the Clerk of the above court the Praeipce for Record, a copy of which is herewith served upon you.

Dated, September 24th, 1940.

Warren Canady,
 Joseph A. Struett,
Attorneys for Defendants, Arnold
W. Kruse and Lester A. Kruse.
 David Baron,
Attorney for William Molasky.
 John L. McInerney,
Attorney for Defendants, James
M. Ragen, James M. Ragen, Jr.

Received a copy of the above and foregoing notice, together with a copy of the Praeipce for Record therein mentioned, this 24th day of September, 1940.

Wm. J. Campbell, RB
United States District Attorney.

636 IN THE DISTRICT COURT OF THE UNITED STATES.
 * * (Caption—31760) * *

PRAECIPE FOR RECORD.

To the Clerk of the United States District Court:

You will please prepare record in the above entitled cause on behalf of the defendants, Arnold W. Kruse, Lester A. Kruse, James M. Ragen, James M. Ragen, Jr., and William Molasky, for use on appeal in the United States Circuit Court of Appeals in and for the Seventh Circuit

and include therein the following documents, orders and items, to-wit:

1. Placita.
2. Indictment filed August 22, 1939.
3. October 30, 1939, Petitions of defendants for order of Releasing Oaths of Secrecy and other relief.
4. November 7, 1939, Order as to Oaths of Secrecy of Witnesses before Grand Jury.
5. November 15, 1939, Plea in Abatement No. 1 of the defendant, William Molasky.
6. November 15, 1939, Plea in Abatement No. 2 of the defendant, William Molasky.
7. November 15, 1939, Plea in Abatement No. 1 of the defendants, Arnold W. Kruse and Lester A. Kruse.
8. November 15, 1939, Plea in Abatement No. 2 of the defendant, Arnold W. Kruse and Lester A. Kruse.
9. November 15, 1939, Plea in Abatement No. 1 of James M. Ragen, Sr., and James M. Ragen, Jr., and the Consensus Publishing Company.
10. November 15, 1939, Plea in Abatement No. 2 of James M. Ragen, Sr., and James M. Ragen, Jr., and the Consensus Publishing Company.
11. November 27, 1939, Motion of the United States of America to strike Pleas in Abatement No. 1.
12. November 27, 1939, Motion of the United States of America to strike Pleas in Abatement No. 2.
13. December 11, 1939, Motion for Leave to file certified copies of certain letters of authority and order allowing same.
- 637 14. December 11, 1939, Certified copy of letter from Attorney General dated May 18, 1939, authorizing Sam Neel to participate in grand jury proceedings.
15. December 11, 1939, Certified copy of letter from Attorney General dated May 18, 1939, authorizing George S. Robinson to participate in grand jury proceedings.
16. December 11, 1939, Certified copy of letter from Attorney General dated May 18, 1939, authorizing James V. Hayes to participate in grand jury proceedings.
17. December 19, 1939, Memorandum by Judge Wilkerson.
18. December 20, 1939, Bill of Exceptions (in the matter of Oaths of Secrecy).
19. December 20, 1939, Order approving Bill of Exceptions (in the matter of Oaths of Secrecy).
20. December 21, 1939, Order sustaining motions to

strike Pleas in Abatement No. 1 and Pleas in Abatement No. 2 of defendants and leave given to defendants to file Pleas in Bar by January 10, 1940.

21. January 10, 1940, Special Plea in Bar (Immunity Plea) of defendant, William J. Molasky.

22. January 10, 1940, Special Plea in Bar (Immunity Plea) of defendant, James M. Ragen, Jr.

23. January 15, 1940, Motion to Dismiss Special Plea in Bar of the defendant, William Molasky.

24. January 15, 1940, Motion to Dismiss Special Plea in Bar of the defendant, James M. Ragen, Jr.

25. January 18, 1940, Motion filed on behalf of the defendants, William Molasky and James M. Ragen, Jr., to strike affidavit of William J. Campbell from the files.

26. February 13, 1940, Motion of defendant, William Molasky, for leave to file amended special plea in bar.

27. February 14, 1940, Bill of Exceptions of defendants to their Pleas in Abatement.

28. February 14, 1940, Order Settling and Approving Bill of Exceptions.

29. February 16, 1940, Motion of defendant, William Molasky, for leave to withdraw special plea in bar.

638 30. April 1, 1940, Order permitting defendant, William Molasky, to file amended special plea in bar.

31. April 1, 1940, Amended Special Plea in Bar of defendant, William Molasky.

32. April 1, 1940, Motion of United States to dismiss amended plea in bar of William Molasky.

33. April 1, 1940, Order allowing defendants to file nunc pro tunc as of January 5, 1940, demurrers to the indictment.

34. April 1, 1940, Demurrers of James M. Ragen, Sr., James M. Ragen, Jr., Consensus Publishing Company, William Molasky, Arnold W. Kruse and Lester A. Kruse filed nunc pro tunc as of January 5, 1940.

35. April 11, 1940, Order Dismissing Immunity Pleas of James M. Ragen, Jr., and William Molasky.

37. April 11, 1940, Order Overruling the Demurrers of the defendants to the indictment.

38. April 23, 1940, Pleas of Not Guilty as to each defendant.

39. May 23, 1940, Motion and Affidavit of John F. Tyrrell on behalf of James M. Ragen, Sr., and James M. Ragen, Jr., for leave to withdraw Pleas of Not Guilty and reinstate demurrers.

40. May 23, 1940, Order overruling motion for leave to withdraw Pleas of Not Guilty and to reinstate demurrers.

41. June 4, 1940, Stipulation as to Dismissal of Certain Defendants filed and order impounding same.

42. July 22, 1940, Motion of United States Attorney to Dismiss M. L. Annenberg, Jules Taylor and Herbert S. Kamin from the indictments.

43. July 22, 1940, Order Dismissing M. L. Annenberg, Jules Taylor and Herbert S. Kamin from the indictments.

44. September 4, 1940, Order overruling demurrers as to James M. Ragen, Sr., and James M. Ragen, Jr., and exception allowed.

639 45. September 4, 1940, Motion of James M. Ragen, Sr., and James M. Ragen, Jr., for bill of particulars denied and exception allowed.

46. September 11, 1940, Motion to Dismiss Indictment and for directed verdict at the close of the government's evidence as to the defendants, James M. Ragen, Sr., James M. Ragen, Jr., Arnold W. Kruse, Lester A. Kruse and William Molasky.

47. September 11, 1940, Order Overruling Motion to Dismiss Indictment and for directed verdict at the close of the government's evidence as to the defendants, James M. Ragen, Sr., James M. Ragen, Jr., Arnold W. Kruse, Lester A. Kruse and William Molasky.

48. September 11, 1940, Defendants offering no evidence, renewal of motion for a directed verdict by all defendants, overruling of same and exception.

49. September 12, 1940, 2 verdicts of Jury.

50. September 12, 1940, Motion for New Trial overruled and exceptions, defendants given three days to file written points. Motion in arrest of judgment overruled and exceptions.

51. September 12, 1940, Judgment of the Court.

52. September 12, 1940, Order permitting bail upon filing of appeal and supersedeas bond of defendants, James M. Ragen, Sr., Arnold W. Kruse and William Molasky in the amount of \$10,000.00 within five days.

53. September 12, 1940, Order permitting bail upon filing of appeal and supersedeas bond of defendants, James M. Ragen, Jr., and Lester A. Kruse in the amount of \$250.00 within five days.

54. September 14, 1940, Motions for New Trial and Motions in Arrest of Judgment filed by defendants, William

Molasky, James M. Ragen, Sr., James M. Ragen, Jr., Arnold W. Kruse and Lester A. Kruse.

55. September 14, 1940, Appeal Bond of William Molasky and Order Approving Same.

56. September 16, 1940, Appeal Bond of Arnold W. Kruse and Lester A. Kruse and Order Approving Same.

57. September 16, 1940, Appeal Bond of James M. Ragen, Sr., and James M. Ragen, Jr., and Order Approving Same.

58. September 16, 1940, Notices of Appeal of James M. Ragen, Sr., James M. Ragen, Jr., Arnold W. Kruse, Lester A. Kruse and William Molasky.

640 59. Order of Court that original Bill of Exceptions filed December 20, 1939, and original Bill of Exceptions filed February 14, 1940, may be incorporated in the record for appeal in lieu of copies thereof.

60. Order of Trial Judge re preparation of Bill of Exceptions or Statement of Evidence as to the defendants. (Not yet received from Trial Judge.)

61. Statement of Evidence or Bill of Exceptions of all defendants. (The date for settling and filing same has not yet been set by the Trial Judge.)

62. Assignments of Error as to all defendants to be attached to the Bill of Exceptions or Statement of Evidence.

63. Notice of filing Praecepta for Record.

64. Praecepta for Record.

Warren Canady,
Joseph A. Struett,

Warren Canady,
Joseph A. Struett,

*Attorneys for Defendants, Arnold
W. Kruse and Lester A. Kruse.*

David Baron.

David Baron.

Attorney for William Molasky

John L. McInerney,

John L. McInerney,

*Attorney for Defendants, James M.
Ragen, James M. Ragen, Jr.*

641 Endorsed: In the District Court of the United States. • • • (Caption—31760) • • • Notice and Praecepta for Record. Filed Sep. 24, 1940, Hoyt King, Clerk.

652 And on, to wit, the 2nd day of October, A. D. 1940, ^{Filed Oct. 2, 1940.} came the United States by its attorneys and filed in the Clerk's office of said Court certain Praecepte for Additional Record in words and figures following, to wit:

653 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA

For the Northern District of Illinois,
Eastern Division.

| | | |
|-------------------------------|---|------------------|
| United States of America | } | D. C. No. 31760. |
| <i>vs.</i> | | |
| Consensus Publishing Company, | | |
| <i>et al.</i> | | |

PRAECEPTE FOR ADDITIONAL RECORD.

To: Hoyt King,
Clerk of Said Court:

In addition to the matters required in the praecipe for defendants for the record on their appeals to the Circuit Court of Appeals for the Seventh Circuit, please include the following:

1. April 1, 1940—Stipulation made by counsel for defendants that the argument on the immunity pleas filed in all of the so-called Annenberg cases should apply to all immunity pleas that had been filed in all cases, including such immunity pleas in the above entitled cause, No. 31760.

2. April 1, 1940—Stipulation made by counsel for defendants that the demurrers filed by defendants in all of the Annenberg cases, including the above entitled cause, No. 31760, were similar and that said demurrers were submitted to the court on briefs filed in conjunction with the argument on the demurrer filed in the cause entitled United States *versus* Moses L. Annenberg, *et al.*, No. 31762.

3. Minute entries in the Clerk's docket showing arguments on April 1, 2, and 3, 1940, on the pleas of immunity filed by certain defendants in the above entitled cause.

654 4. April 3, 1940—Minute entries in the Clerk's

docket showing argument on demurrers filed by defendants in the above entitled cause.

5. May 23, 1940—The opinion of the court overruling the motion of defendants James M. Ragen and James M. Ragen, Jr., for leave to withdraw pleas of not guilty and to reinstate demurrers.

6. September 12, 1940—Six sentences of the court.

7. September 27, 1940—Government's motion to strike certain portions of defendants-appellants praecipe for record.

William J. Campbell.

*William J. Campbell, United
States Attorney for the
Northern District of Illi-
nois.*

Dated: October 2, 1940.

655 Endorsed: In the District Court of the United States. • • (Caption—31760) • • Praecipe for Additional Record. Filed October 2, 1940. Hoyt King, Clerk.

650 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA

For the Northern District of Illinois,

Eastern Division.

United States of America

vs.

William Molaska, Arnold W. Kruse,
Lester A. Kruse, James M. Ra-
gen, James M. Ragen, Jr., and
The Consensus Publishing Com-
pany, an Illinois corporation.

} D. C. No. 31760.

MOTION TO STRIKE CERTAIN PORTIONS OF DEFENDANTS-APPELLANTS' PRAECIPE.

Now comes the United States of America, plaintiff-appellee herein, by its attorney, William J. Campbell, United States Attorney for the Northern District of Illinois, and moves the Court to strike items 21, 22, 23, 24,

25, 26, 29, 30, 31, 32, 36, and 41 from the praecipe for record filed by the defendants-appellants with the Clerk of the above court on September 24, 1940, and in support of said motion shows to this Court as follows:

1. That items 21, 22, 23, 24, 25, 26, 29, 30, 31, 32 and 36 relate solely to certain proceedings resulting from the filing herein by the defendants William Molasky and James M. Ragen, Jr., of Special Pleas in Bar claiming immunity; that the motion of the United States of America, and that said order of dismissal allowed the defendants ninety days from April 11, 1940, within which to prepare and settle a bill of exception relating to the said Special Pleas in Bar; that the said period within which a bill of exception to preserve the proceedings dealing with 651 the said Special Pleas in Bar expired on July 11 1940, and that no bill of exception was prepared or settled during the said period, nor has such bill of exceptions ever been prepared or settled; that the aforesaid items, dealing solely with the said Special Pleas in Bar, are not a proper part of the said record on appeal herein in view of the foregoing facts.

2. That item 41, being a stipulation as to the dismissal of certain defendants from certain indictments, is not a proper part of the record on appeal on this proceeding in that it relates to several indictments not involved in this proceeding and contains nothing that is not included in motions and orders designated by the defendants—appellants herein, and the said stipulation is entirely immaterial to this proceeding.

Wherefore, the United States of America, plaintiff-appellee herein, moves this Court that an order be entered striking items numbered 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, 36 and 41 from the praecipe for record filed by the said defendants-appellants, and for such other and further relief in the premises as this Court shall deem proper.

(Sgd) William J. Campbell,
United States Attorney.

656 Northern District of Illinois, } ss.
 Eastern Division.

I, Hoyt King, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true transcript of the proceedings had of record without Assignment of Errors and Bill of Exceptions which will follow made in accordance with Praecipe filed in this Court in the cause entitled *United States of America v. William Molasky, et al.*, D. C. 31760 as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 19th day of October, A. D. 1940.

Hoyt, King,
 Clerk.

(Seal)

Filed
 Nov. 27,
 1940.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

| | | |
|-----------------------------------|---|---------------------|
| United States of America | } | |
| <i>vs.</i> | | |
| William Molasky, Arnold W. Kruse, | | D. C. No. 31760. |
| Lester A. Kruse, James M. Ragen, | | C. C. A. Nos. 7462, |
| James M. Ragen, Jr., and | | 7463, 7464, 7465, |
| The Consensus Publishing Com- | | 7466. |
| pany, an Illinois corporation. | | |

STIPULATION.

It is hereby stipulated and agreed by and between the United States of America, plaintiff in the above entitled cause, by J. Albert Woll, United States Attorney for the Northern District of Illinois, and William Molasky, Arnold W. Kruse, Lester A. Kruse, James M. Ragen, and James M. Ragen, Jr., defendants herein, by their attorneys, John L. McInerney, Warren Canaday, Joseph A. Struett and David Baron, that in the appeal of said cause

no question will be raised in connection with the briefs and oral arguments in support of the immunity pleas and the demurrers filed herein by certain of the said defendants.

It is further stipulated and agreed that no question will be raised in said appeal concerning the order of the trial court overruling the motion of defendants James M. Ragen and James M. Ragen, Jr., for leave to withdraw pleas of not guilty and to reinstate demurrers, and that no question will be raised in said appeal relating to the denial of said defendants' motions for a bill of particulars.

J. Albert Woll,

*United States Attorney for
the Northern District of
Illinois.*

John L. McInerney,

Warren Canaday,

Joseph A. Struett,

David Baron,

Attorneys for Defendants.

Endorsed: In the Circuit Court of Appeals. • •
(Caption) • • Stipulation. J. Albert Woll, United
States Attorney. Filed November 27, 1940. Kenneth J.
Carrick, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

United States of America

vs.

Molasky, *et al.*

}
Numbers 7462-66.

Filed
Nov. 29,
1940.

STIPULATION.

It is hereby stipulated and agreed by and between the parties, through their respective attorneys, that duplicates of certain documents appearing in the Record and in the Bill of Exceptions in this cause as follows need not be printed, viz.:

1. Petition of James M. Ragen and James M. Ragen, Jr. filed October 30, 1939 for order releasing oaths of

secrecy appearing on pages 174-197, inasmuch as the same also appears on pages 17-39.

2. Petition of Arnold W. Kruse and Lester A. Kruse filed October 30, 1939 for order releasing oaths of secrecy appearing on pages 198-211, inasmuch as the same also appears on pages 40-53.

3. Petition of William Molasky filed October 30, 1939 for order releasing oaths of secrecy appearing on pages 212-223, inasmuch as the same also appears on pages 54-65.

4. Plea in Abatement Number 2 of James M. Ragen and James M. Ragen, Jr., filed November 15, 1939, appearing on pages 341-357, inasmuch as the same also appears on pages 66-83.

5. Order entered on November 7, 1939 appearing on pages 228-229, inasmuch as the same also appears on pages 85-86.

6. Pleas in Abatement Numbers 1 and 2 of Molasky filed November 15, 1939, appearing on pages 332-339 and 370-381, inasmuch as the same also appear on pages 88-110.

7. Pleas in Abatement Numbers 1 and 2 of Arnold W. Kruse and Lester A. Kruse filed November 15, 1939 appearing on pages 323-331 and 358-369, inasmuch as the same also appear on pages 112-135.

8. Pleas in Abatement Number 1 of James M. Ragen and James M. Ragen, Jr. filed November 15, 1939, appearing on pages 308-322, inasmuch as the same also appears on pages 137-150.

9. Motion of the United States filed November 27, 1939 to strike Pleas in Abatement, Numbers 1 and 2 appearing on pages 383-7, inasmuch as the same also appear on pages 152-155.

10. Order entered December 11, 1939 appearing on pages 392-3, inasmuch as the same also appears on pages 159-160.

11. Letters of authority filed December 11, 1939 appearing on pages 395-400, inasmuch as the same also appears on pages 162-164.

12. Memorandum of the Court of December 19, 1939 on Pleas in Abatement appearing on pages 402-407, inasmuch as the same also appears on pages 166-171.

13. Order entered December 21, 1939 dismissing the

Pleas in Abatement appearing on pages 409-411, inasmuch as the same also appears on pages 235-236.

14. Special Plea in Bar (Immunity Plea) of William Molasky filed January 10, 1940 appearing on pages 9-18 of the Bill of Exceptions, inasmuch as the same also appears on pages 233-249 of the Record.

15. Special Plea in Bar (Immunity Plea) of James M. Ragen, Jr. filed January 10, 1940, appearing on pages 2-8 of the Bill of Exceptions, inasmuch as the same also appears on pages 251-258 of the Record.

16. Motions to dismiss the Special Pleas in Bar of William Molasky and James M. Ragen, Jr. filed January 15, 1940 appearing on pages 20-44 of the Bill of Exceptions, inasmuch as the same also appear on pages 269-285 of the Record.

17. Motion of James M. Ragen, Jr. and Molasky to strike the affidavit of the United States Attorney filed January 18, 1940 appearing on pages 46 to 49 of the Bill of Exceptions, inasmuch as the same also appears on pages 287-290 of the Record.

18. Motion of William Molasky filed February 13, 1940 for leave to file an amended immunity plea appearing on pages 51-64 of the Bill of Exceptions, inasmuch as the same also appears on pages 292-305 of the Record.

19. Motion of William Molasky filed February 16, 1940 for leave to withdraw immunity plea appearing on page 66 of the Bill of Exceptions, inasmuch as the same also appears on pages 417-418 of the Record.

20. Amended Special Plea in Bar (Immunity Plea) of William Molasky filed April 1, 1940 appearing on pages 70 to 81 of the Bill of Exceptions and on pages 422-434 of the Record, inasmuch as the same also appears on pages 293-305 of the Record.

21. Order entered April 1, 1940 granting William Molasky leave to file amended special plea in bar appearing on page 68 of the Bill of Exceptions, inasmuch as the same also appears on page 436 of the Record.

22. Motion of the United States to dismiss the Amended Special Plea in Bar of William Molasky filed April 1, 1940 appearing on pages 83-95 of the Bill of Exceptions, inasmuch as the same also appears on pages 438-450 of the Record.

23. Order entered April 11, 1940 dismissing the Special Pleas in Bar appearing on pages 104-105 of the Bill

of Exceptions, inasmuch as the same also appears on pages 477-478 of the Record.

24. Motions to dismiss the indictment and for directed verdicts filed September 10, 1940 appearing on pages 316-330 of the Bill of Exceptions, inasmuch as the same also appear on pages 503-517 of the Record.

25. Motions for new trial filed September 14, 1940 appearing on pages 361-376 of the Bill of Exceptions, inasmuch as the same also appear on pages 545-560 of the Record.

26. Motions in Arrest of Judgment filed September 14, 1940 appearing on pages 378-386 of the Bill of Exceptions, inasmuch as the same also appear on pages 562-570 of the Record.

This stipulation relative to the items hereinabove set forth is without prejudice to any Government motion already presented or that may hereafter be presented to strike any portion of the record in this appeal, including any pleadings, orders and bills of exceptions.

J. Albert Wall,
United States Attorney. A. H.
John L. McInerney,
David Baron,
Warren Canady,
Joseph A. Struett.

Dated: November 29, 1940.

Approved: Major, C. J.
November 29, 1940.

Endorsed: In the U. S. Circuit Court of Appeals. • •
(Caption—7462-6) • • Stipulation. Filed Nov. 29, 1940.
Kenneth J. Carrick, Clerk.

50 And that on February 13, 1940, defendant, William Molasky filed a motion for leave to file an amended special plea in bar, which motion is in words and figures as follows:

Said Motion of William Molasky appears on pages 168-179 of the Printed Record.

65 And that on February 16, 1940, defendant, William Molasky, filed a motion for leave to withdraw his special plea in bar in words and figures as follows:

Said Motion of William Molasky appears on page 179 of the Printed Record.

67 And that on April 1, 1940, an order was entered by the court as follows:

Said Order granting William Molasky leave to file amended special plea in bar appears on page 180 of the Printed Record.

69 And that on April 1, 1940, defendant, William Molasky, filed an Amended Special Plea in Bar to the Indictment in words and figures as follows:

Said Amended Special Plea in Bar (Immunity Plea) of William Molasky appears on pages 180-191 of the Printed Record.

82 And that on April 1, 1940, the United States Attorney filed a motion to dismiss the amended special plea in bar of defendant, William Molasky, which motion is in words and figures as follows:

Said Motion of the United States to dismiss the Amended Special Plea in Bar of William Molasky appears on pages 191-201 of the Printed Record.

96 And that on April 10, 1940, the motion of the United States Attorney to dismiss the Special Plea in Bar of Defendant, James M. Ragen, Jr., and the motion of the United States Attorney to dismiss the amended Special Plea in Bar of Defendant, William Molasky, came on for hearing by the Court and after hearing argument thereupon by counsel, the Court announced its opinion as follows:

United States of America, }
 vs. } Before Judge Wilkerson.
Moses L. Annenberg, et al. }

Wednesday, April 10, 1940,
10 o'clock A. M.

Court met pursuant to adjournment.

DECISION.

The Court: The defendants have demurred to the indictments on grounds of alleged duplicity and uncertainty. The assertion that each of the first five counts charges several offenses is, in my opinion, without foundation. The counts charge the offense of attempting to defeat and evade the income tax upon the net income of Moses L. Annenberg. The indictment then sets out the means by which the attempt was made. The language of those counts, in my opinion, can not reasonably be construed in any other way.

97 Nor does the language of the first five counts permit the construction that defendants other than M. L. Annenberg are charged as accessories after the fact. The defendants are all charged as principals.

The attack on the conspiracy count, in my opinion, is equally without merit. That count charges a single continuing conspiracy to defraud the United States of income taxes of M. L. Annenberg for the years 1932 to 1936, inclusive.

It is unnecessary to analyze the language of these counts further. They are substantially in forms which have been before the courts many times and upon which many convictions have been sustained by the reviewing courts.

The construction which the court is constrained to place

upon the indictment discloses of the pleas of the three year statute of limitations. The defendants being charged as principals, that statute is not applicable.

Some of the defendants have filed special pleas in bar in which they claim immunity from prosecution because of testimony given before the grand jury. A great variety of views have been expressed by the courts as to the construction and application of the federal immunity statutes. The argument for a broad construction and application of those statutes was made very persuasively at the hearing. Upon the words of the statute the argument of the counsel for the defendants is hard to meet.

98 The trial court, however, is bound to heed language used by the Supreme Court in construing those statutes, even if that language went beyond the precise question before the court.

Consider the words of Mr. Justice Holmes, speaking for the entire court in *Heike v. U. S.*, 227 U. S. 131, 141, 142:

'The petitioner contended that, as soon as he had testified upon a matter under the Sherman Act, he had an amnesty by the Statute from liability for any and every offence that was connected with that matter in any degree, or, at least, every offence towards the discovery of which his testimony led up, even if it has no actual effect in bringing the discovery about. At times the argument seemed to suggest that any testimony, although not incriminating, if relevant to the later charge, brought the amnesty into play. In favor of the broadest construction of the immunity act, it is argued that when it was passed there was an imperious popular demand that the inside working of the trusts should be investigated, and that the people and Congress cared so much to secure the necessary evidence they were willing that some guilty persons should escape, as that reward was necessary to the end. The government on the other hand maintains that the statute should be limited as nearly as may be by the boundaries of the constitutional privilege of which it takes the place.

'Of course, there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should
99 be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would

have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier acts of February 11, 1893, c. 83, 27 Stat. 443, which read: "No person shall be excused from attending and testifying," &c., "but no person shall be prosecuted," &c., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, "was not coextensive with the constitutional privilege." *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 611. Compare act of February 19, 1903, c. 708, Sec. 3, 32 Stat. 847, 848.' And again:

'When the statute speaks of testimony concerning a matter it means concerning it in substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law.' *Heike v. U. S.*, *supra*.

The rule which makes the grant of immunity coterminous with the privilege of silence under the Fifth Amendment is sustained by the reasoning in *Hale v. Henkel*, 201 U. S. 43; *United States v. Murdock*, 284 U. S. 141 and kindred cases.

If we consider the history of this immunity legislation and some of the early decisions of the lower courts under it, it is clear that the words of the Supreme Court were intended to put a check upon the extremes to which some of the lower courts in this district as well as others had gone in granting immunity.

100 As the courts have pointed out, the statute of immunity must be administered with common sense. On the one hand, some questions are of such character that the witness would understand naturally and inferentially that he would be immune if he answered and thus proceed to answer without asserting his right, while under other circumstances it would be his duty to assert it if he intended to rely on it.

The privilege of silence has been defined in language approved by the Supreme Court as follows:

"To entitle a party called as a witness to the privilege of silence, the Court must see from the circumstances of the case and the nature of the evidence which the witness is called upon to give that there is reasonable ground to apprehend danger to the witness from being compelled to answer. * * * If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question.

"Further than this * * * the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice." *Brown v. Walker*, 161 U. S. 591, 599, 600.

A plea of immunity under the statute in question, which merely states that a witness testified concerning certain matters is not sufficient. The plea should state the substance of the testimony given by the witness and should show by apt averment of fact that, if it were not for the immunity statute the witness could have invoked the constitutional privilege of silence.

The special pleas in bar do not measure up to the requirements of the rule above stated. They merely state that the witness gave evidence concerning certain matters which are mentioned in the indictments.

102 The averments of the pleas may be true and still the witness may not have been called upon to answer a single question which subjected him to the danger of prosecution under a federal law. Reference has been made to the 14th paragraph in the plea of Hafner, and similar allegations in other pleas. The language is general, evasive, and argumentative. It is not sufficient to take the place of the definite averments of fact which are required in a special plea in bar which set up the claim of immunity.

The motions of the United States to dismiss the pleas are sustained, and the United States Attorney may prepare orders in accordance with these rulings and submit them in each of the cases. Now, that disposes of all the preliminary matters."

103 And that on April 11, 1940, the Court entered an order as follows:

Said Order dismissing the Special Pleas in Bar appears on pages 217-218 of the Printed Record.

106 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

ASSIGNMENT OF ERRORS ON BEHALF OF DEFENDANTS, JAMES M. RAGEN, JR. AND WILLIAM MOLASKY.

The trial court erred in dismissing the immunity pleas of defendants, James M. Ragen, Jr. and William Molasky.

John L. McInerney,
Attorney for Defendant,
James M. Ragen, Jr.
David Baron,
Attorney for Defendant,
William Molasky.

107 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—31760) * *

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS, IMMUNITY PLEAS.

Pursuant to order of this court, there was lodged with the trial judge on or before November 22, 1940, the bill of exceptions on immunity pleas in the above entitled cause for the court's approval, all parties were notified thereof and the settling of said bill of exceptions was set by the trial court for November 22, 1940.

The trial court being fully advised in the premises, finds that the attached bill of exceptions is a true and complete statement of all the proceedings had before this court on the immunity pleas in this cause, and sufficient to present to the reviewing court all the questions of law involved

in the rulings to which exceptions were reserved and which were covered by the assignment of errors thereto attached.

It Is Therefore Ordered, Adjudged and Decreed that the above and foregoing bill of exceptions, be and the same are hereby approved as a true, correct and complete statement of all the proceedings had upon the immunity pleas in the above entitled cause and is properly prepared in accordance with the rules of the Supreme Court of the United States and the rules of the Circuit Court of Appeals, Seventh Circuit, and the Clerk of this District Court is hereby ordered to include said bill of exceptions, the assignment of errors thereto attached and this order in the transcript of record of said cause certified by him to the United States Circuit Court of Appeals, Seventh Circuit, in accordance with the praecipe of record heretofore filed in this cause.

I have certified this bill over the objection (1) that it should have been presented within 90 days from April 11, 1940 and (2) that it is not necessary to file this bill as its contents are in the common law record.

Walter C. Lindsey,
Judge.

Dated: November 22d, 1940.

IN THE
United States Circuit Court of Appeals
For the Seventh Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
7462 *vs.*
WILLIAM MOLASKY, *Defendant-Appellant.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
7463 *vs.*
JAMES M. RAGEN, *Defendant-Appellant.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
7464 *vs.*
JAMES M. RAGEN, JR., *Defendant-Appellant.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
7465 *vs.*
LESTER A. KRUSE, *Defendant-Appellant.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
7466 *vs.*
ARNOLD W. KRUSE, *Defendant-Appellant.*

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Appeals from the District Court of the United States for
the Northern District of Illinois, Eastern Division.

INDEX.

VOLUME I.

| | |
|--|----|
| Placita | 1 |
| Indictment, filed August 22, 1939..... | 2 |
| Petition of Annenberg, et al., to release Oaths of Secrecy, etc., filed October 30, 1939..... | 28 |
| Petition of Kruse, et al., to release Oaths of Secrecy, etc. | 13 |
| Petition of Molasky to release Oaths of Secrecy, etc... | 54 |
| Order on petitions to release Oaths of Secrecy, etc., en- tered November 7, 1939..... | 63 |
| Bills of Exceptions in matter of Oaths of Secrecy, filed December 20, 1939..... | 64 |
| Order approving Bill of Exceptions re Oaths of Secrecy, entered December 20, 1939..... | 67 |
| Plea in Abatement No. 1 of Molasky, filed November 15, 1939 | 68 |
| Plea in Abatement No. 2 to Fifth Count of Molasky, filed November 15, 1939..... | 73 |
| Exhibit A—Oath of Earl C. Crouter..... | 79 |
| Exhibit B—Oath of E. Riley Campbell..... | 80 |
| Exhibit C—Oath of Samuel Klaus..... | 80 |
| Plea in Abatement No. 1, of Kruse, et al., filed Novem- ber 15, 1939 | 81 |
| Plea in Abatement No. 2 to Fifth Count of Kruse, et al., filed November 15, 1939..... | 87 |
| Exhibit A—Oath of Earl C. Crouter..... | 93 |
| Exhibit B—Oath of E. Riley Campbell..... | 94 |
| Exhibit C—Oath of Samuel Klaus..... | 95 |
| Plea in Abatement No. 1, of Ragen, et al., filed Novem- ber 15, 1939 | 96 |

| | |
|--|-----|
| Plea in Abatement No. 2 to Fifth Count of Annenberg, et al. | 103 |
| Exhibit A—Oath of Earl C. Crouter..... | 111 |
| Exhibit B—Oath of E. Riley Campbell..... | 112 |
| Exhibit C—Oath of Samuel Klaus..... | 113 |
| Motion to Strike Pleas in Abatement No. 1, filed No- vember 27, 1939 | 114 |
| Motion to Strike Pleas in Abatement No. 2..... | 115 |
| Order as to motions to strike, etc., entered November 27, 1939 | 116 |
| Order granting leave to file letters of authority, en- tered December 11, 1939 | 117 |
| Letter of May 26, 1939, appointing George S. Robin- son Special Assistant, filed December 11, 1939..... | 118 |
| Letter of May 18, 1939, appointing James V. Hayes Special Assistant, filed December 11, 1939..... | 119 |
| Letter of May 18, 1939, appointing Sam Nell Special Assistant, filed December 11, 1939..... | 120 |
| Memorandum on motions to strike Pleas in Abatement, filed December 19, 1939 | 121 |
| Order striking Pleas in Abatement Nos. 1 and 2, en- tered December 21, 1939 | 125 |
| Order granting leave to file Pleas in Bar, entered De- cember 21, 1939 | 126 |
| Bill of Exceptions on Pleas in Abatement, filed Feb- ruary 14, 1940 | 127 |
| Order approving Bill of Exceptions on Pleas in Abate- ment, entered February 14, 1940..... | 132 |
| Special Plea in Bar of Molasky (Immunity Plea), filed January 10, 1940 | 133 |
| Subpoena | 139 |
| Special Plea in Bar of Ragen, Jr. (Immunity Plea), filed January 10, 1940 | 141 |
| Summons | 145 |

| | |
|--|-----|
| Motion to Dismiss Plea in Bar of Molasky (Immunity Plea), filed January 15, 1940 | 146 |
| Exhibit A—Affidavit of William J. Campbell.... | 150 |
| Motion to Dismiss Plea in Bar of Ragen, Jr. (Immunity Plea), filed January 15, 1940..... | 156 |
| Exhibit A—Affidavit of William J. Campbell.... | 160 |
| Motion to Strike Affidavit of William J. Campbell, filed January 18, 1940..... | 165 |
| Motion of Molasky for leave to file Amended Special Plea in Bar, filed February 13, 1940..... | 168 |
| Amended Special Plea in Bar of Molasky..... | 168 |
| Exhibit A—Summons | 175 |
| Exhibit B—Subpoena Duces Tecum | 176 |
| Exhibit C—Summons | 178 |
| Motion of Molasky to withdraw Special Plea in Bar, filed February 16, 1940 | 179 |
| Order granting leave to Molasky to file Demurrer, nunc pro tunc as of January 5, 1940, entered April 1, 1940 | 179 |
| Order granting leave to Molasky to file Amended Special Plea in Bar, entered April 1, 1940..... | 180 |
| Amended Special Plea in Bar of Molasky, filed April 1, 1940 | 180 |
| Exhibit A—Summons | 187 |
| Exhibit B—Subpoena Duces Tecum | 188 |
| Exhibit C—Summons | 190 |
| Motion to Dismiss Special Amended Plea in Bar of Molasky, filed April 1, 1940..... | 191 |
| Exhibit A—Affidavit of William J. Campbell.... | 195 |
| Order granting leave to file Demurrers to Indictment, nunc pro tunc as of January 5, 1940, entered April 1, 1940 | 201 |
| Order on motion to dismiss Pleas, entered April 1, 1940 | 201 |

| | |
|--|-----|
| Demurrer of Kruse, et al., to Indictment, filed April 1, 1940 (Nunc pro tunc as of January 5, 1940)..... | 202 |
| Demurrer of Molasky to Indictment, filed April 1, 1940 (Nunc pro tunc as of January 5, 1940)..... | 206 |
| Demurrer of Annenberg, et al., to Indictment, filed April 1, 1940 (Nunc pro tunc as of January 5, 1940)..... | 210 |
| Order as to Pleas of Immunity, entered April 2, 1940..... | 215 |
| Order as to Demurrers, entered April 3, 1940..... | 215 |
| Order as to Pleas in Bar, entered April 3, 1940..... | 216 |
| Order as to Pleas of Immunity, entered April 3, 1940..... | 216 |
| Order overruling Demurrers, entered April 11, 1940..... | 217 |
| Order dismissing Immunity Pleas of Ragen, Jr., and Molasky, entered April 11, 1940..... | 217 |
| Order on Trial, entered April 23, 1940..... | 219 |
| Motion of Ragen, et al., to withdraw pleas of not guilty, etc., filed May 23, 1940..... | 220 |
| Affidavit of John F. Tyrrell | 220 |
| Order on motion to withdraw pleas of not guilty, etc., entered May 23, 1940 | 225 |
| Order impounding Stipulation, entered June 4, 1940..... | 225 |
| Stipulation as to dismissal of certain Defendants, etc..... | 226 |
| Order dismissing Indictment as to certain Defendants, entered July 22, 1940 | 227 |
| Motion to dismiss Indictment as to certain Defendants, filed July 22, 1940..... | 228 |
| Order as to withdrawal of appearance of John M. Tyrrell, etc., entered September 4, 1940..... | 229 |
| Motion of Kruse, et al., to dismiss Indictment and for directed verdict, filed September 10, 1940..... | 230 |
| Motion of Ragen, et al., to dismiss Indictment and for directed verdict, filed September 10, 1940..... | 232 |
| Motion of Molasky to dismiss Indictment and for directed verdict, filed September 10, 1940..... | 234 |

| | |
|---|-----|
| Order overruling motions to dismiss and for directed verdict, entered September 11, 1940..... | 236 |
| Verdict as to Molasky, Arnold Kruse, Ragen, Sr., Ragen, Jr., and The Consensus Publishing Co., filed September 12, 1940 | 237 |
| Verdict as to Lester A. Kruse, filed September 12, 1940 | 238 |
| Order overruling motions for new trial and motions in arrest of judgment, entered September 12, 1940.... | 238 |
| Judgment as to James M. Ragen, entered September 12, 1940 | 239 |
| Judgment as to James M. Ragen, Jr., entered September 12, 1940 | 240 |
| Judgment as to Arnold W. Kruse, entered September 12, 1940 | 241 |
| Judgment as to Lester A. Kruse, entered September 12, 1940 | 243 |
| Judgment as to William Molasky, entered September 12, 1940 | 244 |
| Judgment as to The Consensus Publishing Co., entered September 12, 1940 | 245 |
| Order as to supersedeas Bonds, entered September 12, 1940 | 246 |
| Order as to Appeal Bonds of Lester A. Kruse and Ragen, Jr., entered September 12, 1940..... | 247 |
| Motion of Lester A. Kruse for new trial, filed September 14, 1940 | 247 |
| Motion of James M. Ragen for new trial, filed September 14, 1940 | 250 |
| Motion of James M. Ragen, Jr., for new trial, filed September 14, 1940..... | 251 |
| Motion of William Molasky for new trial, filed September 14, 1940 | 251 |

| | |
|--|-----|
| Motion of Arnold W. Kruse for new trial, filed September 14, 1940 | 252 |
| Motion of William Molasky in arrest of judgment, filed September 14, 1940 | 255 |
| Motion of Arnold W. Kruse in arrest of judgment, filed September 14, 1940 | 255 |
| Motion of Lester A. Kruse in arrest of judgment, filed September 14, 1940 | 256 |
| Motion of James M. Ragen in arrest of judgment, filed September 14, 1940 | 256 |
| Motion of James M. Ragen, Jr., in arrest of judgment, filed September 14, 1940 | 257 |
| Bond of William Molasky, filed September 14, 1940 | 257 |
| Order approving bond of Molasky, entered September 14, 1940 | 260 |
| Bond of Lester A. Kruse, filed September 16, 1940 | 260 |
| Bond of Arnold W. Kruse, filed September 16, 1940 | 262 |
| Order approving bond of Arnold W. Kruse, entered September 16, 1940 | 264 |
| Bond of James M. Ragen, Sr., filed September 16, 1940 | 264 |
| Bond of James M. Ragen, Jr., filed September 16, 1940 | 266 |
| Notice of Appeal of Lester A. Kruse, filed September 16, 1940 | 268 |
| Notice of Appeal of Arnold W. Kruse, filed September 16, 1940 | 270 |
| Notice of Appeal of William Molasky, filed September 16, 1940 | 273 |
| Notice of Appeal of James M. Ragen, filed September 16, 1940 | 279 |
| Notice of Appeal of James M. Ragen, Jr., filed September 16, 1940 | 285 |

| | |
|---|-----|
| Order approving bonds of Ragen, Sr., and Ragen, Jr., entered September 16, 1940..... | 291 |
| Order as to originals of Bills of Exceptions, entered September 23, 1940 | 292 |
| Order as to Bill of Exceptions, entered September 24, 1940 | 293 |
| Notice and Praecept for Record, filed September 24, 1940 | 294 |
| Additional Praecept for Record, filed October 2, 1940.. | 299 |
| Motion to strike portions of Appellant's Praecept, filed October 2, 1940..... | 300 |
| Clerk's Certificate | 302 |

PAFERS FILED IN THE CIRCUIT COURT OF APPEALS.

| | |
|--|-----|
| Stipulation as to briefs and argument in Immunity Pleas, etc., filed November 27, 1940..... | 303 |
| Stipulation as to printing record, filed November 29, 1940 | 303 |
| Bill of Exceptions on Immunity Pleas..... | 307 |
| Decision on Motion to Dismiss Pleas, etc. | 309 |
| Assignment of Errors of Ragen, Jr., and Molasky. | 313 |
| Order approving Bill of Exceptions on Immunity Pleas | 313 |

BILL OF EXCEPTIONS.

VOLUME II.

| | |
|----------------|---------------|
| Colloquy | 443, 457, 474 |
|----------------|---------------|

GOVERNMENT'S WITNESSES.

Testimony of:

| | |
|----------------------------|-----|
| Brooks, Gordon | 350 |
| Burrs, Clyde | 339 |
| Clark, Howard | 410 |
| Dilthey, Gilbert | 366 |
| Eisenberg, Meyer M. | 369 |
| Hyland, James W. | 424 |
| Kamin, Herbert S. | 371 |
| Keeler, Katherine | 399 |
| Maas, Philip | 423 |
| Matheis, George | 321 |
| Meyer, Gilbert | 363 |
| Norton, Helen J. | 316 |
| Rohan, Patrick A. | 398 |
| Sandberg, Clarence C. | 357 |
| Taylor, Jules | 346 |
| Walter, Eugene J. | 364 |
| Zweig, Julius | 319 |

GOVERNMENT'S EXHIBITS.

| | |
|--|-----|
| No. 59—Stock Certificate in name of Julius Taylor... | 372 |
| No. 70—Letter, Jan. 4, 1934, Molasky to Matheis..... | 332 |
| No. 73—Letter, Dec. 21, 1933, to Molasky..... | 331 |
| No. 82—Employment Contract, dated Jan. 2, 1932.... | 382 |
| No. 83—Assignment, dated Jan. 2, 1932..... | 382 |
| No. 107—Original Stock Certificate | 366 |

| | |
|---|-----|
| No. 108—Original Stock Certificate | 368 |
| No. 109—Letter, Oct. 1, 1929, A. W. Kruse to Molasky | 436 |
| No. 115—Telegram, A. W. Kruse to Molasky..... | 359 |
| No. 119—Letter, Jan. 6, 1933, Molasky to Kruse..... | 356 |
| No. 120—Letter, Feb. 14, 1933, Molasky to Kruse.... | 357 |
| No. 200—Letter, Aug. 27, 1934, Kamin to Molasky... | 377 |
| No. 201—Letter, Apr. 9, 1935, Kamin to Molasky.... | 380 |
| No. WP-12—Work Sheet showing percentages disbursed each week | 414 |
| No. 29-CR-1—Weekly Sheet | 333 |
| No. 33-CR-33—Weekly Report, week of Aug. 19, 1933. | 335 |
| List of Government Exhibits | 445 |
| List of First National Bank Exhibits..... | 452 |
| List of Mississippi Valley Trust Co. Exhibits..... | 455 |
| Oral decision on Motion to Dismiss..... | 464 |
| Charge to Jury | 466 |
| Assignments of Error | 478 |
| Order approving and settling Bill of Exceptions..... | 479 |
| Clerk's Certificate to Bill of Exceptions..... | 480 |
| Order granting leave to Molasky to file Additional Assignments of Error, entered Jan. 6, 1941..... | 481 |
| Additional Assignments of Error of Molasky, filed Jan. 6, 1941 | 481 |
| Order granting leave to Ragen, et al., to file Additional Assignments of Error, entered Jan. 6, 1941..... | 482 |
| Additional Assignments of Error of Ragen, et al., filed Jan. 6, 1941 | 482 |
| Order granting leave to Kruse, et al., to file Additional Assignments of Error, entered Jan. 6, 1941..... | 483 |
| Additional Assignments of Error of Kruse, et al., filed Jan. 6, 1941..... | 484 |



108 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

BILL OF EXCEPTIONS
PROCEEDINGS AT THE TRIAL.

Be it remembered that on the 4th day of September, 1940, at a regular term of the District Court of the United States, for the Northern District of Illinois, Eastern Division, at Chicago, Illinois, the above entitled cause came on for trial.

Mr. William J. Campbell, United States Attorney, by Mr. Austin Hall, Assistant United States Attorney, representing the plaintiff, the Government, and John L. McInerney, representing the defendants, James M. Ragen and James M. Ragen, Jr., and Joseph A. Struett and Warren Canady representing the defendants, Arnold W. Kruse and Lester Kruse, and David Baron representing the defendant, William Molasky.

Counsel for defendants made a motion for a bill of particulars. The court denied the motion. Thereupon, a jury was impaneled and sworn and the trial commenced.

Thereupon, the Government, to sustain the issues on its part, called the following persons as witnesses in its behalf, each of whom have been duly sworn and testified as follows:

109 HELEN J. NORTON, a witness for the Government, testified as follows:

On Direct Examination by Mr. Hall.

I now am and since July 1, 1935 have been chief of the Income Tax Assessment Section of the office of the Collector of Internal Revenue, Chicago, Illinois, for the First Collection District of Illinois, comprising 26 Illinois counties, including Cook. Taxpayers file their tax returns at the office of the Collector, United States Court House, Chicago, Illinois, as required by law.

I am familiar with the procedure a tax return follows when filed. Such procedure in sequence is as follows:

A stamp is put on to indicate the time and place received; if the return is accompanied by money, the payment and method of payment are marked in blue pencil; a serial number is assigned; the returns are assembled in blocks of 100 and registered; the assessment list is prepared; the computation is checked by a comptometer operator; a circle is placed on the return indicating the tax to be assessed; the return is then posted on the assessment list. 1040 (individuals with income over \$5,000.00) and corporation returns are forwarded to the Commissioner of Internal Revenue. 1040A returns (individuals with income less than \$5,000.00) are retained in the Collector's Office.

When the returns go to the Auditing Section for preparation of the Assessment, an index card, 355, is prepared indicating the name, address and card serial number. She identifies Government Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9 as income tax returns for 1929 to 1937 filed in the 110 office of Collector of Internal Revenue for First Collection District of Illinois, for the Consensus Publishing Company.

Government's Exhibit 1 shows the amount due to the Government for 1929 in the lower right hand corner in red pencil, \$355.15. The records in her office indicate no additional tax was paid for 1929. That is the only return filed for 1929 by the Consensus Publishing Company.

For 1931, there was an additional tax paid of \$24.00 on January 20, 1934 as the result of an audit.

For 1932, there was an additional tax paid of \$96.10 paid February 21, 1934, as the result of an audit. No other additional tax returns were filed or additional taxes paid by or assessed against Consensus Publishing Company for the years 1930 to 1937 inclusive.

Thereupon, Government Exhibits 1 to 9, both inclusive, were offered and received in evidence.

The witness is shown Government Exhibits 10 to 18, both inclusive, income tax returns of Arnold W. Kruse for 1929 to 1936, both inclusive. Arnold W. Kruse paid no additional tax and filed no additional returns for those years.

The witness is shown Government Exhibits 19 to 25, both inclusive, income tax returns of Lester A. Kruse for 1932 to 1936, both inclusive. No additional taxes were paid or additional returns filed for those years.

The witness is shown Government Exhibits 26 to 29, both inclusive, and 27A income tax returns of Mrs. Alma Kruse for 1932, 1933, another for 1933, 1934 and 1935. No additional taxes were paid or additional returns filed for those years except for 1933 an additional return was filed, Exhibit 27A.

111 The witness is shown Government Exhibits 30 to 38, both inclusive, income tax returns of James M. Ragen, Sr. For 1929 an additional tax of \$181.40 was paid December 11, 1931 as the result of an audit. For 1931, an additional tax of \$400.00 was paid January 18, 1934 as the result of an audit. Otherwise, no additional income taxes were paid or returns filed for 1929 to 1937, both inclusive.

The witness is shown Government's Exhibits 39 to 45, both inclusive, income tax returns of James Ragen, Jr. for 1931 to 1937, both inclusive. No additional taxes were paid or additional returns filed for such years.

On Cross-Examination by Mr. McInerney.

Income tax returns of corporations regardless of size of income and of individuals with incomes in excess of \$5,000.00 are sent to the Commissioner of Internal Revenue, Washington. The Commissioner requires all returns to be audited. There are certain procedures to go through in Washington, whether the return should be inspected or accepted as filed. If the Commissioner desires an audit of the return, he sends it to the Revenue Agent in charge here for a field audit.

These additional taxes shown here were the result of an audit by the Revenue Agent in charge. Before the Collector sends the returns to Washington, his office makes a preliminary audit, a check of the figures on the face of the returns.

112 The consensus Publishing Company returns for 1931 and 1932 were sent to the Revenue Agent at Chicago to be audited. The additional tax on 1931 was

assessed January 10, 1934 and the additional tax on 1932 was assessed on January 25, 1935. There is an audit stamp on these returns that indicates an audit was made. It doesn't appear on the others. They may have been examined. I cannot tell.

I first saw Government's Exhibits 1 to 9 in a group several weeks ago, when they were handed to me and I checked my records to prepare to testify here.

Where an additional tax is assessed directly through the Commissioner's office, if the agent recommends it, there is a certain custom to forward the envelope to the Collector's office for assessment. On the Collector's records no additional tax to be paid is recorded unless it is unpaid and in his hands for collection. That could be obtained only through Washington. I do not know where or in whose custody the returns have been in the last two or three years.

On Cross-Examination by Mr. Struett.

If there is some question on the face of the return, it is sent to the Revenue Agent here to make a field audit, a more intense audit than given in the Collector's Office. He files a report. I don't have those in this case. They are in Washington.

On Redirect Examination by Mr. Hall.

The stamp in the upper left hand corner of the Consensus Publishing Company returns for 1931 and 1932 indicates to me that an additional tax was assessed. The stamp is an audit stamp, showing a liability increase with the amount of the tax. The stamp includes the pen written name of the agent who made the audit. On the return for 1931, Government's Exhibit 3, it is M. J. Tobin. The name of the agent does not appear on the stamp on the return for 1932.

114 JULIUS ZWEIFG, a witness for the Government, testified as follows:

On Direct Examination by Mr. Hall.

I have lived in St. Louis, Missouri, for about thirty years. I am presently confined in a penitentiary at Danbury, Connecticut, for a federal lottery offense in connection with the Will Rogers Memorial Hospital.

In 1927, I was in the printing business in St. Louis, Missouri. I brought into being and sold a card known as a run-down sheet. That is a line-up of the horses entered in a given race in certain order so that the bookmaker or anyone interested may take information as to the running of the race as it occurs at the track. The card probably includes four or five tracks, any that are running that particular day. When I started I got the information by telephone from the Racing Form at Chicago. That after a while became too expensive and I had the form sheets sent by special carrier. Later I got the information from a wire service, General News Bureau or Empire at St. Louis.

I began this business of printing run-down sheets in 1927 or 1928. I continued it myself until the latter part of 1929 and it was progressing. I sold run-down sheets to bookmakers in St. Louis, that is people who take bets on horses. Prior to the latter part of 1929, William Molasky came into the business with me. Molasky produced a similar sheet, first gave the sheets away 115 freely, later charged a price, and thus competed with me. We later entered into a partnership. I previously had broached the subject to Molasky who didn't want to have anything to do with it. Later after the thing was a proven success, Molasky came through with a competing sheet. Things went along unsatisfactorily after competition entered the field. Neither I nor Molasky could operate profitably, I having retained about 50% of the original business and Molasky having gained about 50% of the business, so we entered into a partnership agreement at Molasky's suggestion.

Counsel for defendants, James M. Ragen, Jr. and James M. Ragen, Sr. objects on the grounds that this was a

conversation in December, 1929, long before the alleged conspiracy was inaugurated, that it is not binding upon the Ragens, that no conspiracy has been established, and the conversation between Molasky and one of his competitors has nothing to do with any substantive offense of income tax evasion. The court ruled: the objection will be overruled as to Molasky and the evidence received subject to the objection of the other parties.

116 Molasky stated at the time the partnership was entered into that because other people were interested the division of profits should be made: 60% to Molasky and his co-workers and 40% to me. Molasky mentioned his co-workers as people in Chicago. I cannot state if Molasky mentioned any names.

The witness identifies Government Exhibit 65 as the original agreement and the signatures thereon. I received no cash consideration for giving Molasky an interest in my business and no property passed, except that I was to receive the first \$1,000.00 the business earned after expenses were paid, as set forth in Government Exhibit 66, a copy of the subsequent supplementary agreement of partnership made with Molasky a few days after the other agreement. I was paid the \$1,000.00. Counsel for defendant Molasky admitted the documents were authentic.

I continued in partnership with Molasky and his associates until the latter part of 1929, when I sold my interest to Molasky for \$9,500.00. Government Exhibit 63 is the contract of sale made at the time. Molasky approached me and asked me if I wanted to sell. At the time I told him no, but I did sell eventually. There was no intimidation.

I have known Molasky for 25 years. Molasky was also in the business of distributing various magazines, publications, racing forms.

117 I sold my 40% to Molasky September 9, 1929. I got my \$9,500.00.

Molasky had some printing machinery where he produced various office forms for use in his own business.

The work required in production and distribution of a run-down sheet was merely a question of getting the information as it came over the wire, setting the type, and making up the form. The sheet was a cardboard about 26 inches square on ordinary pulpboard. Government's

Exhibit 64 is such a run down sheet containing the same information that was on the sheets when I was in that business in St. Louis with Molasky.

It would require one man four or five hours to set the type for a run-down sheet, and another hour or two to print them. I did not handle the distribution personally. While I and Molasky were partners a man in Molasky's employ who distributed other things at the time would distribute them. Before that, I employed motorcycle help. I delivered to 150 persons a day in St. Louis. All were bookmakers, one might take two or three cards. They sold for either 25¢ or 35¢ apiece.

It cost in the neighborhood of \$12.00 per day for the labor in setting the type, printing and distribution to get out a run-down sheet. Paper would be two or three dollars more.

I have never had any business dealings with Kruse or Ragen, Sr. I have known Kruse and Ragen, Sr. for three or four years.

Counsel for defendants stated there is no question as to identity. GOVERNMENT'S EXHIBITS 63 to 66, inclusive, were offered and admitted in evidence.

118 *On Cross-Examination by Mr. Baron.*

The dealings I had with Molasky were long before there was any criminal prosecution as a result of which I was incarcerated in the penitentiary.

119 GEORGE MATHEIS, a witness for the Government, testified as follows:

On Direct Examination by Mr. Hall.

I live at Houston, Texas. I lived in Chicago about six or seven years ago. During that period my occupation has been a bookkeeper for the Racing Form and Cecilia and M. L. Annenberg, the Annenberg Companies, whose main offices are at 731 Plymouth Court, Chicago, Illinois. I was first employed by the Annenberg Companies about 1924 or 1925 by Arnold W. Kruse as a bookkeeper for the

Racing Form. All that time I was Kruse's assistant. I continued working in Chicago for about nine years from 1924 or 1925 until 1933 or 1934. Kruse was the accountant for the Racing Form and manager, and in charge of the Consensus Publishing Company, and of the books here in Chicago.

I recall the organization of the Consensus Publishing Company. I notarized the Articles of Incorporation (Government Exhibit 67). That is Molasky's signature on the Articles. The Articles were signed and notarized by me on September 10, 1929. The next signer of the Articles is Howard Clark, bookkeeper in the witness' office at that time, who started the Consensus books at that time. Clark was working under Kruse. I know Thomas Ryan, the next signer. At the time Ryan worked for the Central Distributing Company which delivered the racing forms. Later on, Ryan worked for The General News Bureau

or Nationwide News Service. J. M. Ragen, Sr. was 120 the manager of the General News Bureau or the Nationwide News Service. Those are the signatures of Molasky, Clark and Ryan appearing upon that certified copy of the Articles of Incorporation. At the time I notarized the Articles of Incorporation, I saw the contents of the Articles and knew they were signing as incorporators. Jules Taylor lives in New York. He works for the Interstate Brokerage Company, an Annenberg Company, in the insurance business. He was working there in 1929 when the Articles were signed. I did not prepare the Articles of Incorporation.

I worked on the Consensus Publishing Company books after it was organized.

It was stipulated Consensus Publishing Company is a corporation. I worked on Government's Exhibit CB-1, the cash book of the Consensus Publishing Company. All of the entries starting in May of 1933 and continuing until and including July, 1934 are in my handwriting from page 46 to page 61. Howard Clark made the entries in that cash book before I commenced making them. In all of my work as bookkeeper in the Annenberg companies, Kruse gave me all my instructions. The entries made by me in Exhibit CB-1 were the moneys collected and disbursed each week by the Consensus Publishing Company. The entries were made in Chicago where the books were kept from information from the reports received from Molasky in St. Louis.

The Consensus Publishing Company was in the business of printing and selling run-down sheets to bookmakers 121 in Cincinnati and St. Louis. Molasky was in charge of the actual operations of the company. Arnold W. Kruse kept the books of the Consensus Publishing Company in Chicago. I would not know what else he did in the business.

Government's Exhibit J-1 is the journal of the Consensus Publishing Company and contains entries in the witness' handwriting from May, 1933 through June of 1934. The witness made entries in the journal charging and crediting the expense accounts.

Government's Exhibit GL-1 is the ledger of the Consensus Publishing Company. I made entries in it during the same period.

All of those books were kept under Kruse's supervision all the time.

Government's Exhibits 33 WR-34 to 33 WR-103 inclusive, are the weekly report sheets which Molasky sent into to the Chicago office during the time I worked on the books of the Consensus Publishing Company. They were mailed to the Chicago office by Molasky in St. Louis or somebody in his office. Those sheets show the amount of collections and the expenses of running the business.

In the first one, 33 WR-34, the receipts are given as \$1600.88, expense as \$673.55, leaving a net balance of \$927.33 for one week. These reports were sent in for the business of each week. The week is designated on each sheet right on top the week ending such and such a date.

All other sheets are similar.

122 I checked the information given on the sheets against the bank accounts to see that they balanced. The Consensus Publishing Company had two bank accounts at that time. One in the Mississippi Valley Trust Company in St. Louis and one in Chicago. The receipts shown on the sheets are the deposits made in the account in St. Louis. I copied the information given on the sheets into the cash book. CB-1 has the debits and the credits in the St. Louis bank account. The Consensus Publishing Company also had an account with the First National Bank of Chicago which merely held moneys that were transferred from the original account in St. Louis. The receipts would be the deposits in the St. Louis bank. The entries in the book showing the receipts of the business each week are credited to St. Louis and charged to the St. Louis bank account. At

the top of page 34 it says, "May 6, 1933, collections and transfer." That entry, \$1600.88 shows the receipts of the business for that week.

At the top, where it says after "Run-down report for week ending May 5, 1933" that shows the sales that were made that week. The credit is money transferred from the St. Louis bank account to the Chicago bank account. You have a debit and a credit in that one bank account. Every week it was taken out of one bank account and put to another bank account. The money was originally deposited in the St. Louis bank and when it was deposited there, the bank was charged. Then, it was drawn out of that bank and put into another bank in Chicago, the First National Bank, from which the other checks were made out.

123 The next entry "William Molasky, \$938." is check number 938. He got a check for \$673.55 which were the expenses that the man had for that week's business, as shown by the weekly report.

Cecilia Investment Company got check 939 for \$278.08, which was 36% of the week's profit. That check was issued in Chicago and drawn upon the First National Bank of Chicago, the Consensus Publishing Company account.

The next item, "William Molasky," check 940 for \$139.04 was for his fifteen per cent for that week. B. Hoffman 15% throughout was also his. He was getting 30%. The basis for that entry was a set figure that they got week after week. That was not obtained from the weekly report. The computation was made by whoever handled the books. Originally, the percentage that each person was to get was fixed by Arnold W. Kruse and that was given to him each week in that proportion.

The next item (B. Hoffman) is also 15%, \$139.04.

Lester Kruse, Check 942. He got \$185.39. That is 20%. J. Ragen, Jr., check number 943; \$185.38 is 20%.

Then the collections and transfers started again for the next week. From there are collections and transfers down to and including J. Ragen, Jr., which is one week's total business as reflected by the cash book.

Thirty per cent of the profit that was accounted for at the St. Louis office for the week was given to Cecilia. The expenses of the weekly report were itemized in another
124 report to show what they were for, labor, payroll, mailing, postage, printing, etc. That left what is shown on the report, \$927.33. Thirty per cent of that was dis-

tributed to the Cecilia Corporation. Possibly I drew the check. Mr. Molasky and Mr. Kruse signed it. Then there was a check made to Molasky for 15 per cent of that same amount and to B. Hoffman 15 per cent, the same amount. To Lester Kruse, 20 per cent, and J. M. Ragen, Jr., 20 per cent, making a hundred per cent of the entire balance that was left after the payment of expenses.

Government's Exhibit 33 WR-35 bears the same date as Government's Exhibit 33 WR-34. Exhibit 33 WR-35 is the itemized list of expense totaling \$673.55. Mr. Molasky sent two sheets each week, one showing the receipts and the other expenses. The expenses were one week late. Mr. Molasky would forward another sheet showing the itemized list of the expenses that he had incurred the preceding week in the operation of the company's business. I copied the receipts and expenses into the cash book. The entries which I made in the cash book for receipts were for the amount of money that Mr. Molasky collected during that period. That is under the heading "Collections and transfers." In the cash book the expenses are shown in one expense account. A check was made out to Mr. Molasky for the total amount of the expense for that week. Later on that was broken down by journal entry charging the various expense accounts and charging the general expense account in the ledger. To repeat, on page 46 of CB-1 under May of 1933 is entered the collections as shown by Mr.

Molasky's weekly report, \$1600.88 then the item "William Molasky \$673.55" is a check for the expenses drawn on the Chicago bank. The next entry on the same date, "Cecilia Investment Company" is the share of money that belonged to the Cecilia Company out of the profits for that week. This was thirty per cent. The next, "William Molasky, \$139.04" is fifteen per cent of what was left over. Next, "B. Hoffman" in the same amount is for fifteen per cent of what was left over of the week's profits, and together William Molasky and B. Hoffman got thirty per cent. The next "Lester Kruse, \$185.30, is for twenty per cent, and the next, "J. Ragen, Jr." \$185.30, is for twenty per cent. I would state that offhand the same procedure went all the way through the book.

Mr. Burris' handwriting follows mine in the book and Mr. Clark preceded me. Mr. Clark's handwriting starts at the beginning in September of 1929.

The last week where I made entries in the book is the

last week of July 26th, 1934 on page 61. The items and amounts for that week are: "collections and transfers, \$2484.45." That was transferred out of the St. Louis Bank and into the Chicago bank, where it was disbursed. William Molasky got \$684.55 which was for expenses. The Cecilia Company got \$539.99, Molasky got \$269.99, B. Hoffman got \$269.99, Lester Kruse got \$359.98 and J. Ragen, Jr. got \$359.98.

Arnold W. Kruse had supervision of the books of account of the Company. If any instructions were given he would give them. He told me that the Consensus Publishing Company was owned by the Cecilia Company. I never saw the stock book of the Consensus Publishing

Company while I was keeping the books, nor any of its stock certificates. Kamin had charge of all the stock books.

Arnold W. Kruse told me those entries of payments were commissions, at the beginning of my work. Kruse told me these payments to Molasky, Kruse and Ragen were commissions and were to be charged to the commission account on the Consensus books and the books showed they were charged there. There was a schedule in the back of the check book showing the amount that each and every one was supposed to get and I followed that. Kruse told me that they were commissions. The money left after Molasky was repaid for his expenses was distributed: Cecilia, 30%, Molasky, 30%, Kruse, 20%, Ragen, 20%. The schedule was in back of the check book. There was a little slip of paper pasted there showing the amounts that they were supposed to get. I do not know who originally prepared it. When Consensus was started, that arrangement was made and we kept right on following the same procedure. When the check book was used up, the same slip was pasted in back of the new check book. While I was there, the apportionment for the last week was identical with that of the first week.

Government's Exhibit J-1, is the journal of the Consensus Publishing Company containing entries in my handwriting beginning at page 51 from May, 1933 until June, 1934, page 65. In May the various expense accounts were charged and the large expense account was credited.

That was actually the distribution of the expense during that period for the month, charged to delivery, electric and gas, exchange, express, postage, general expenses, interest, labor, etc. Page 59, May 1934 is in C-B-1. The expense item for the last week on page 59 is "William

Molasky, \$815.51." That is the expense account each week entered in the journal. The entries in the journal are broken down. In the cash book they are in a lump sum. The journal merely contains the items constituting the expenses submitted by Molasky each week on his letterhead as having been incurred in the operation of the business for that week or the preceding week. It itemizes the expenses. There is nothing else in the journal.

Clark's handwriting in the journal preceded the witness. Clark's handwriting ended April of 1933. Starting on page 66, Burris' handwriting followed mine. All the expenses of Consensus Publishing Company are in that book.

Government's Exhibit GL-1 is the ledger of the Consensus Publishing Company containing entries made in the witness' handwriting from May, 1933 to July, 1934. Those entries are not in consecutive order. All items were entered in the ledger. They were put in the cash book and in the journal, and then posted into the ledger account where they were properly credited and properly debited. The percentages paid out and charged as commissions in the cash book were entered there. They were posted monthly. When they were carried into the ledger, distributions were charged against a certain account. They went directly from the cash book to the ledger. The payment 128 to Cecilia went to the dividend account of Cecilia. The payments to Molasky, Hoffman, Ragen and Kruse were charged to the commission, ledger account. There was one commission account in the ledger. Arnold W. Kruse originally told me to do that. My handwriting begins May, 1933. The commission account is only the amounts totaled for each month to the different individuals. Everything paid to Molasky, Hoffman, Ragen and Kruse was lumped together in one debit item. It is itemized in the cash book. Rather than make forty or fifty postings in one month, we just posted one amount in the ledger book.

On the page in the ledger headed, "Commissions Consensus," that is what those items mean. January 31st under 1933, that is \$4006.92. That means that so much money was paid out of the earnings of the Consensus Publishing Company to those people in that month as commissions and charged as commissions. The next month, February 28, 1933, \$4502.04. My first entry in the book is May 31st, cash book 46, \$4025.55. June 30th, cash book 47, \$4261.51. July 31st, cash book 48, \$6113.74. August 31st, cash book 49, \$4777.14. September 30th, cash book 51,

\$5269.59. October 31st, cash book 52, \$4145.70. November 30th, cash book 53, \$4467.04. December 31st, cash book 54, \$4995.61. That is all in 1933. In 1934, January 31st, \$4912.04. February 28th, \$4179.15. March 31st, \$5456.91. April 30th, \$4253.20. May 31st, \$4788.13 and June 30th, \$5259.24. That looks like my writing. All of the entries made in these books, especially in my handwriting, were made in the usual course of the business of the Consensus Publishing Company.

129 The payments charged as commissions as shown by the cash book and ledger constituted 20, 30 and 30; a total of 70 per cent of the net earnings of the Consensus Publishing Company, and the 30 per cent that went to Cecilia constituted the 100 per cent. Every week I made out a check on the bank account of the Consensus Publishing Company with the Mississippi Valley Trust Company for whatever amount was deposited that week, except for a small balance of \$100.00.

Government's Exhibit 33-CR-18 is a record of the Consensus Publishing Company made in the usual course of business, showing receipts and disbursements from its work sheets. It shows the amount of the receipts from May 6, 1933, \$2,219.25, total expenses of \$713.31, and a profit of \$1505.94. Counsel for defendants admitted these are accurate records of the Consensus Publishing Company.

The Court: The evidence in this case is undisputed, according to the defense statement, that these weekly receipts were received, that the expenses at St. Louis were deducted, that the remainder was divided 30 per cent to Cecilia, 30 per cent to Molasky and his associate, 20 per cent to Ragen and 20 per cent to Kruse. There is no dispute that he charged those to commissions, except as to Cecilia, which he charged to dividends.

\$100.00 was left every week in the Mississippi Valley Trust Company.

The documents called Government's Exhibits 33 CR 18 to 33 CR 31, bearing date May 6, 1933 to and including 130 July 28, 1934, must have been typed by some girl.

They were taken from my work sheets. The figures came out of the books. I knew they were being typed. Four of them were typed. Arnold W. Kruse must have told me to have four typed. The four copies were given to a girl. Molasky got one, Ragen got one, Kruse got one and the other one stayed in the office as our record, and one for Cecilia. I drew the checks that were sent weekly to Mo-

lasky, Hoffman, Ragen and Kruse during that period. I drew the checks on the Consensus Publishing Company account in St. Louis on the Mississippi Valley Trust Company that transferred the money from that bank account up to the First National Bank in Chicago. I did not sign them. Government's Exhibits JMJ-110 to JMJ-182 are checks for payments to James M. Ragen, Jr., made out by me. The signatures on the first check are William Molasky and A. W. Kruse. There are some other signatures.

Government's Exhibits LK-8 and LK-71 are checks payable to Lester Kruse. The signatures are William Molasky and Arnold W. Kruse and Ragen signed some of them. Counsel for defendants admitted the checks are genuine and were paid. Government Exhibits WM-168 to Government Exhibit WM-231 are similar checks payable to William Molasky and signed by Molasky and Kruse and some of them by Mr. Ragen. All those checks were paid out on the bank accounts. These checks were all drawn on the bank account of the Consensus Publishing Company in the First National Bank of Chicago.

131 Government's Exhibits BH-17 to BH-81 are similar checks made to B. Hoffman. These are part of Mr. Molasky's. Someone told us to make them out to B. Hoffman. Originally, Molasky got 30%. 15% was paid to B. Hoffman before I came there and I made out a check for 15%.

Government's Exhibits C-70 to C-231 are similar checks made payable to the Cecilia Investment Company representing the 30% that went to the Cecilia.

Government Exhibits WP-1 to WP-29 (WP-13 to WP-18 being in the witness' handwriting) are work papers, the sheet from which journal entries were made and entered in the cash book. They have the breakdown of expenses. They show the distribution of these payments at the bottom. They were made in the usual course of business of the company. Clark made the work papers before I commenced. Commencing with WP-12 and going back to WP-1, they are in his handwriting. Clark started WP-13. I just put some figures in these commencing with the column dated May 6, 1933. I kept the record the same as Clark had been doing.

On WP-12 the item "Dividends" under "Disbursements" shows distribution of all the profits of the Company after the deduction of expenses. WP-13, one-half of

which bears my handwriting also has the heading, "Dividends," which distributes all the money, including payments to these individual.

WP-14 which is in my handwriting distributes all of the money under "Dividends and Commissions." A. W. Kruse must have told me to make that "Dividends and Commissions" instead of "Dividends." The entry "dividends and commissions" is marked June 24, 1933. That was right after I started. I did not follow entirely the entries 132 that had been previously made on the work papers by Clark.

I am presently employed by an Annenberg Company in Houston, Texas.

I took the figures off the records and put them on the income tax return for one year or maybe for more than one year. It was part of my duty to prepare figures for the tax return for the Consensus Publishing Company. Arnold W. Kruse would have had to tell me to do it as part of my work. I would have had to do it, even if Kruse had not told me. That was part of my duties.

In preparing the figures for tax returns, I took the sales and the various expenses from the books and figured out what the profit is and put that down on the income tax return. That has to be the same as shown on the books of original entry. Kruse told me that certain entries were commissions, so that they would have to be deducted on the income tax return. If they were expense, they would have to be deducted.

Government's Exhibit A-5 is a copy retained by the Consensus Publishing Company of its income tax return for the year 1933. The return is in my writing throughout. I took the figures from the records and just made out the income tax returns. There were a lot of income tax returns that were made out in that office and the original of this income tax return was then given to Mr. Kruse to look it over and sign it. The payments charged as commissions appear in the tax return as a schedule showing who got all that money. They are entered under "Other deductions." "\$77,796.20." They are broken down on a yellow sheet 133 bearing the names, William Molesky, B. Hoffman, Lester Kruse and James Ragen, Jr., giving the amount paid to each one that year, in a total of \$54,537.65.

Government's Exhibit 5 is the original of a tax return for 1933. The payments charged as commission were de

ducted in there as an expense as per schedule attached the white paper. It bears the signature of A. W. Kruse. I notarized Government Exhibits 1 to 5, tax returns for 1929, 1930, 1931, 1932 and 1933 as part of my duties. Whoever made up the returns after he obtained Arnold W. Kruse's signature, brought them over to me and I notarized them. Kruse saw all the returns and signed them. All the signatures on these are the true signatures of the persons whose signatures they purport to be.

I did not, while working on the books, see any written contracts between the Consensus Publishing Company and anybody else. I know nothing about them, nor did I hear of them. While there, I received a letter from Mr. Molasky concerning income tax matters, Government Exhibit 70. The signature is Molasky's. The handwriting over the first paragraph in the letter is mine. I took up the letter with Arnold W. Kruse and talked to him about it. Kruse said to give Molasky the things he wanted.

When I had inquiries concerning tax matters, I took them to Arnold W. Kruse to get the information. Kruse was in charge of everything in the office that concerned income tax.

134 Government Exhibit 73 is a copy of a letter sent by me to Molasky dated December 21, 1933. GOVERNMENT'S EXHIBIT 73 is as follows:

December 21, 1933.

Mr. William Molasky,
814 So. Broadway,
St. Louis, Mo.

Dear Bill:

Enclosed herewith find check for expenses of the Consensus Publishing Company for the week ending December 16th.

You will note that no dividend checks will be issued until such time as I can talk to Mr. Kruse regarding the 5% tax on dividends which has to be paid to the Government on all dividends paid to individuals.

As soon as we can get this straightened out I will advise you.

Yours very truly,

GM:EA

I did not discuss the subject matter of that letter with Arnold W. Kruse until after it was sent.

In talking to Arnold W. Kruse, he did not ever refer to the payments charged as commissions as anything besides commissions. Thereupon, the United States Attorney offered Government Exhibits 70 to 74 in evidence. Counsel for the defendants objected to the admission of these letters in evidence on the ground they have nothing whatever to do with the Consensus Publishing Company. They are dividends of other companies. The court overruled the objection as to Government's Exhibits 70 and 73 which were received in evidence and sustained the objections as to

Government's Exhibits 72 and 74. Said Government's 135 Exhibit 70 is a letter dated January 1, 1934 from Molasky to Matheis as follows:

136 GOVERNMENT'S EXHIBIT NO. 70.

Garfield 4718

Garfield 4739

Garfield 4719

The Pierce Building News Co.
William Molasky, Proprietor
Magazines, Periodicals and Newspapers
812-814 South Broadway,
St. Louis, Mo.

Jan. 4, 1934

Mr. George Matheis,
Daily Racing Form Pub. Co.,
441 Plymouth Court,
Chicago, Illinois.

Dear George:

Although you told me you wanted to wait until Kruse came back, isn't it possible for you to give me the information that I asked for regarding the commissions that I received and B. Hoffman received on Consensus; also commissions dividends received by Jack Bleiweiss on the R. D. Publishing Company, and dividends that Mrs. Molasky and myself received on the Molasky Holding Company?

As I explained to you before I am leaving for New Orleans and when I return I am planning on going to Florida, so if you can give the total amount that each one of us received I will be able to make out my income tax.

Regardless of this extra 5% on dividends it still would not have any bearing on what I have received so I would appreciate if you could send me this information as soon as possible giving me the total amount B. Hoffman received, Jack Bleiwess, Mrs. Molasky and myself received.

If you cannot give me the Molasky Holding Company information I am sure you could give me the R. D. and Consensus Publishing Company amounts.

Would appreciate your giving me this information as soon as possible.

Very truly yours,

Pierce Building News Company

WM:AK

Per: William Molasky.

(In Pencil) Consensus

Wm Molasky

11686.61

B. Hoffman

11686.60

137 Government Exhibit WP-19 is in Burris' handwriting and WP-20 is in Burris' and Hafner's handwriting.

Government Exhibits WP-21, 22, 23, 24, 25 and 26 are in Burris' handwriting. WP-27 and 28 are in John O'Donnell's handwriting. Government's Exhibit 29 might be in Sandberg's handwriting. I am not positive. Thereupon, the GOVERNMENT'S EXHIBITS WP-1 to WP-29 were offered and admitted in evidence.

GOVERNMENT'S EXHIBITS 29 CR 1 to 29 CR 14, both inclusive, are the weekly sheets made at the Chicago office. These exhibits were offered and received in evidence without objection.

GOVERNMENT'S EXHIBIT 29 CR-1 is as follows: October 28, 1929.

Consensus Publishing Company

(Illinois corporation)

Officers

President

Vice President

Secy. & Treasurer

Directors

William Molasky

Thomas Ryan (Resignation filed)

Howard Clark (Resignation filed)

William Molasky

Thomas Ryan (Resignation filed)

Howard Clark (Resignation filed)

Jules Taylor (proxy for Cecelia

Investment Company)

| Stockholder (actual) | Number of Shares | Dummy |
|------------------------|------------------|--------------|
| William Molasky | 30 | None |
| Cecelia Investment Co. | 30 | None |
| A. W. Kruse | 20 | Howard Clark |
| J. M. Ragen | 20 | Thomas Ryan |

Incorporated in Illinois September 18, 1929.

Authorized Capital—\$5,000.00—100 shares, \$100.00. No par value.

Annual Meeting Eighteenth day of September each year unless a holiday then on the succeeding day.

Head Office 441 Plymouth Court Chicago, Illinois on all books of record, minute book, seal, etc., held in custody of A. W. Kruse. Stock certificates in possession of actual Stockholders.

138 Likewise offered and received in evidence were the following GOVERNMENT'S EXHIBITS: 30 CR 1 TO 30 CR 50 FOR 1930; 31 CR 1 TO 31 CR 52 FOR 1931; 32 CR 1 TO 32 CR 52 FOR 1932; 33 CR 1 TO 33 CR 51 FOR 1933; 34 CR 1 TO 34 CR 52 FOR 1934; 35 CR 1 TO 35 CR 52 FOR 1935; 36 CR 1 TO 36 CR 53 FOR 1936; 37 CR 1 TO 37 CR 52 FOR 1937.

All of the foregoing documents were delivered to the Government under a grand jury subpoena issued to the Consensus Publishing Company. The CR exhibits are the weekly reports drawn in the Chicago office and sent to the persons who received percentages of the net profits of the company. The weekly reports, commencing on October 12, 1929 to and including August 19, 1933 and for the period June 5, 1937 to November 5, 1937 have the word "dividends" under "Disbursements." All except 4 of the other weekly reports have the phrase "dividends and commissions" under disbursements. Typical of these weekly reports issued by the Chicago office is Government's Exhibit 33 CR 33 for the week of August 19, 1933, which is in words and figures as follows:

139 Consensus Publishing Co.

August 19, 1933

| | | |
|-------------------|---------|-------------------|
| Receipts | | \$2,430.58 |
| Expenses | | |
| Checks N.S.F. | 23.70 | |
| Delivery | 85.00 | |
| Exchange | 2.00 | |
| Express & Postage | 74.09 | |
| General | 1.55 | |
| Insurance | 64.00 | |
| Labor | 114.78 | |
| Office | 35.00 | |
| Printing—Cincy | 100.00 | |
| Rent | 10.00 | |
| Salaries—Cincy | 125.00 | |
| Owens | 100.00 | |
| Tele. & Tele | 15.25 | |
| Traveling | 50.00 | 800.37 |
| Net Profit | | <u>\$1,630.21</u> |
| Bank Account | | |
| Balance | 100.00 | |
| Profit | 1630.21 | 1,730.21 |
| Disbursements | | |
| Dividends | | <u>1,630.21</u> |
| Balance | | <u>\$ 100.00</u> |

The CR Exhibits commencing on April 12, 1929 to and including August 19, 1933 and the CR exhibits for the period June 5, 1937 to November 5, 1937 have the word "dividends," the same as Government's Exhibit 33 CR 33. All except 4 of the other CR exhibits have the phrase, "Dividends and Commissions" under "Disbursements."

140 GOVERNMENT'S EXHIBITS CB 1 and CB 2, being the cash books of the Consensus Publishing Company, J 1 being the journal, and GL 1 being the ledger, were offered and received in evidence.

Also the following Government's Exhibits were offered and received in evidence, being distribution sheets of the Consensus Publishing Company payable to the persons and for the periods as follows:

GOVERNMENT'S EXHIBITS JM 1 to JM 59, being distribution checks payable to J. M. Ragen, Sr., from October 28, 1929, to March 19, 1931;

GOVERNMENT'S EXHIBITS JMJ 1 to JMJ 355, being distribution checks payable to J. M. Ragen, Jr., from April 3, 1931, to December 31, 1937;

GOVERNMENT'S EXHIBITS C 1 to C 406, being distribution checks payable to the Cecelia Company from October 28, 1929, to December 31, 1937;

GOVERNMENT'S EXHIBITS AK 1 to AK 30, being distribution checks payable to Mrs. Alma Kruse from August 11, 1932 to March 16, 1933;

GOVERNMENT'S EXHIBITS WM 1 to WM 456, being distribution checks payable to William Molasky from October 28, 1929 to December 31, 1937;

GOVERNMENT'S EXHIBITS BH 1 to BH 205, being distribution checks payable to B. Hoffman, from January 5, 1933, to December 31, 1936;

GOVERNMENT'S EXHIBITS LK 1 to LK 196, being distribution checks payable to Lester Kruse, from March 23, 1933, to December 31, 1936;

141 GOVERNMENT'S EXHIBITS AW 1 to AW 186, being distribution checks payable to Arnold W. Kruse, from October 28, 1929, to December 31, 1937.

GOVERNMENT'S EXHIBITS A 1 to A 9, being the retained copies of the income tax returns of the Consensus Publishing Company for the years 1929 to 1937, both inclusive, were offered and received in evidence.

GOVERNMENT'S EXHIBITS 31 WR 1 to 31 WR 104, 32 WR 1 to 32 WR 104, 33 WR 1 to WR 103, 34 WR 1 to 34 WR 104, 35 WR 1 to 35 WR 104, 36 WR 1 to 36 WR 106, 37 WR 1 to 37 WR 104, being the weekly reports sent by William Molasky to the Chicago office during the years 1931 to 1937, both inclusive, were offered and received in evidence.

None of my handwriting is on WP 12. It is in Clark's handwriting.

Government's Exhibit WP 13 is in Clark's handwriting and in my handwriting.

The entry "Dividends," where the money was distributed at the end of each week on WP 13, is written by Clark. On Government's Exhibit WP 14 in my handwriting, it is marked "dividends and commissions." I saw the papers that Clark had been filling out. I did not adopt the same heading "dividends" as Clark when

commenced working on the sheets because it was wrong to charge these to "dividends." That is why the correction was made, because it was wrong to charge these expenses to dividends when they were commissions. Nobody told me to do that. The books of original entry and the ledgers were always charged "dividends and commissions." In the work sheet here Clark had the word "dividend." When I started, I changed it to read, "dividends and commissions account." In my work 142 sheets I made the correction "dividends and commissions." The last time I saw the sheets was probably six or seven years ago when I last worked on them. The entries there, "dividends and commissions" were made evidently at the time the sheet was made up. I changed it because it was charged in the ledger to "dividends and commissions." It was charged that way when Clark kept the books too. Clark had been making these to read "dividends" for 1931, 1932 and 1933." Clark showed these on this sheet as dividends. He charged this to dividends and commissions account. He went wrong on the work sheet. I did not ask anybody to find out if Clark was wrong.

The Chicago reports, the four copies that were sent to Ragen, Molasky and Kruse were copies of the work sheets made out on a typewriter. On the bottom of the sheet it is marked, "dividends." On examining the reports, the witness stated that he did not mark these "dividends." They were copies by a girl from a work-sheet which was started by Clark who had "dividends" down started out on the last sheet when I started and I marked it "dividends and commissions." The report sheets were an exact copy of the work sheets. The report sheets were not changed.

On Government's Exhibit WP-14, at the item, "disbursements, div. comm." there has been an erasure, evidently of the word "dividend." I saw it was wrong and I erased it. I do not know when I made the erasure. It was not recently. I have not seen the sheets for over six years. I made the erasure because the accounts at the bottom were "dividends and commissions" the way they are all over the books.

143 Government's Exhibit 30-CR-1 says: "No dividends this week." That was not during the time I was working on them. The witness stated that if he could look at the weekly reports that were copies by the

girl which are dated consecutively and see when it begins to say "cash dividends and commissions," then the time of the erasure could be found out, and that the type-written reports could verify the time.

The report sheets were private reports sent to the recipients of the percentages of the profits. I do not know if the Internal Revenue Agents made an examination in that office of those report sheets. The Internal Revenue Agents would get whatever they asked for. I have seen Internal Revenue Agents there. I do not remember if the books of the Consensus Publishing Company were audited by the Internal Revenue Agents because they had so many Internal Revenue Agents coming there. Evidently they must have been, because we had income tax men over there very often ever since I began to work there, even before 1934. I do not know if the Revenue Agents ever asked me for these reports or that I gave them to any Revenue Agents.

On Cross-Examination by Mr. McInerney.

The apparent change in the work paper headings from "dividends" to "dividends and commissions," was made some time in August, 1933. The weekly report for August 26, 1933 reads "dividends and commissions" so that erasure must have been made in 1933 sometime. Before August 26th, those reports were marked "dividends." After August 26th, they read, "dividends and commissions."

144 The collections of the Consensus Publishing Company were received in St. Louis and were deposited in a St. Louis bank, the Mississippi Valley Trust Company. Molasky made a report to the Chicago office of the Consensus Publishing Company stating the gross receipts and certain expenses deductible from 1929 up to now. From the weekly reports an entry was made in the cash book reflecting the weekly statements. Disbursements were made then and the percentages retained by the week. The money was taken in the St. Louis bank and put into Chicago for disbursement. Cash disbursements were entered by the end of the month showing the name, to whom paid, and the amount received, the percentage and what it was for. Then they went into the general ledger. The records were in the office of the Consensus Publishing Company at all times at Chicago,

Illinois. The books, ledgers, and the disbursement journals are in the same condition as they were when the witness worked on them. From September 29, 1929 to April of 1939 they contain all this information.

On Redirect Examination by Mr. Hall.

At the time I quit entering distribution of profits as "dividends" on the work sheets and began calling them "dividends and commissions," there was no change in the procedure of distribution. They were charged in the same place, as always. They were always charged in the ledger and cash book. I took charge of the books in May, 1933. The change was made in August, 1933. The work sheets were started by Clark and on the last work sheet of Clark I finished out the same way.

145 CLYDE BURRIS, a witness for the government, testified as follows:

On Direct Examination by Mr. Hall.

I am a bookkeeper working for the Daily Racing Form, Cecelia, one of Annenberg's companies, having been such since May, 1933. George Matheis employed me. I went to work as a bookkeeper on the Daily Racing Form for the Publishing Company. For some time I did not work on any other books. Later on, I did. In July and August of 1934, I worked on Consensus Publishing Company and various other books.

Government's Exhibit CB-1 and CB-2 are the books of the Consensus Publishing Company which I worked on when I was first employed. I made entries in the books in my own handwriting working under Arnold W. Kruse. I worked on the books until April, 1936. I also made entries in the journal and general ledger and made up work sheets, from the weekly reports sent by Molasky. Part of the work papers I made out are Government's Exhibit WP-29. They are not in my handwriting until May 26, 1934, which continues until June 25, 1936. I drew checks distributing the earnings of the Consensus Publishing Company while working on those papers.

No one told me to draw checks. When I took over the

work, I was to follow along and distribute the money the same, just as it had been before. I do not remember specifically any one telling me how to draw the checks or anything like that. I drew 30% to Cecelia Company; 30% to Molasky; that is, 15% to Molasky and 15% to B. Hoffman. It is hard to tell the first work sheet I made out. On one sheet, it had already been written down in

Matheis writing and I merely continued the sheet 146 until I finished. On the next sheet which comes in at December 9, 1933, "adv." under item "dividend and commissions," the "dv." under disbursements is not in my handwriting. Under "disbursements div. and comm." and then the letters "adv." mean advanced, dividends and commission advances. I had no discussion with anybody as to how to make that entry on the papers. I made charges of the payment out of the earnings of the company in the cash book and in the general ledger of commissions. No one told me to do that. I just followed the books as they were, checks had been charged that way previously and I continued in the same manner. I always had white sheets made showing the receipt of expenses and the division of the profits each week. The girl typed those from this work sheet report. There were several copies made. Sometimes they were sent to the people who were receiving them.

147 The entries made in the books were paid in the names of the persons whose names appear opposite the amounts in the cash book. Twenty percent of the earnings were paid by checks to Lester Kruse. Mr. Kruse knew they were entered in that way. No one told me day by day how to enter those transactions.

There was a conversation in the office of Arnold W. Kruse where Kruse, Hafner and I were present when those commissions were talked about. That was probably at the end of about 1934 or 1935. About the first tax return that I made up. Government's Exhibit A6 and A7 are in my handwriting. The deductions for commissions as expenses were as they show. The conversation about one of these returns was in Kruse's office in February or March, 1935. Counsel for defendants James M. Ragen and James M. Ragen, Jr. objected to the question by the government "Tell us what was said." The court ruled that admissible against Kruse at least at this time.

The witness stated that they were making up the tax

returns. I asked Kruse about the various deductions. The deduction for commissions being a large amount, was pointed out to him. I asked Kruse if this were a proper deduction. He said it was a proper deduction. I gave Kruse the return for 1934 to inspect. I pointed out to Mr. Kruse about the deductions of those commissions because it was so large an item in regard to the total amount and we wanted Mr. Kruse to be familiar. In making out the return I deducted from income in addition to other expense the amount paid to the various persons other than the Cecelia Company. These were deducted as commissions and expense. I then went to Kruse and wanted to know if that was the right way to do it.

148 Twenty percent payments were being paid to Lester Kruse. When the checks were made out they went to Arnold W. Kruse, and Ragen or Molasky for signature. Part of the checks to Lester Kruse were deposited by me in the A. W. Kruse special account at the First National Bank. A. W. Kruse told me to do that. They were deposited in the A. W. Kruse special account. I entered those checks in the name of Lester Kruse in a personal record he kept for Lester Kruse. I kept a personal cash book for A. W. Kruse and for Lester Kruse, a separate page for each one. A. W. Kruse told me to do that as I was taking care of his money. Lester Kruse never gave me any instructions. Lester Kruse was in the office on an average of once a month over the year. I have no knowledge of any work that Lester Kruse ever did for the Consensus Publishing Company. I entered the checks that were paid in the name of Lester Kruse in the cash book at Arnold W. Kruse's instructions. A. W. Kruse told me to keep an account both of his money and Lester's money. The cash book was kept in the office on my desk most of the time. A. W. Kruse might have seen the book very often.

I also kept a general ledger and journal for the same period. George Matheis kept the books before me.

Twenty percent of the earnings of the company were also paid James M. Ragen, Jr. during the period I kept the books. I have no knowledge of any work that James M. Ragen, Jr. or Ragen, Sr. ever did for Consensus Publishing Company.

Arnold W. Kruse supervised the records for the Consensus Publishing Company. He was the general book-

149 keeper of the Annenberg Companies in charge of their books. This book was the Annenberg Company's book. I do not recall anything else that I discussed with Arnold W. Kruse about the commission charge.

In that same conversation I asked A. W. Kruse why the commission payments were so even and totalled one hundred percent of the net earnings. I asked why since they came out one hundred percent some of them were commissions and some were dividends and how they could be divided that way. I asked him why it was handled that way.

Kruse said it was an amount fixed by Annenberg at the time the company was started. Each one was to get a certain percentage of the earnings. It was not a mathematical formula or anything like that. I signed a statement in the District Attorney's Office that I asked A. W. Kruse at different times why commission payments were all even and why there is a total of one hundred percent of the earnings and Kruse said "It was an arbitrary arrangement." I did not tell the District Attorney about Annenberg fixing the amount. The witness says he still says it the same way. It was an arbitrary amount. That is what Kruse told me, it was an arbitrary arrangement.

I check the checks he wrote against the bank's statement and reconciled them. I also drew the checks paying Molasky for the expenses. I also checked the bank account to prove the correctness of the receipts. I checked the bank account after I made out the checks and distributed the earnings which were charged to commissions. The bank account always reconciled.

150 While keeping the books of the Consensus Publishing Company I never saw any employment contracts. Never heard of any and nobody ever told me of any.

On Cross-Examination by Mr. McInerney.

I have been a bookkeeper for probably twenty years, practically all of my life. I went to business college, then I came to Chicago, and went to various evening schools, The Walter School of Commerce, Loyola University and took various correspondence courses. I have no degrees from any colleges. I am a certified public accountant in the State of Kentucky, having taken and passed an ex-

amination there for which I received my certificate. I have worked for about five years as a public accountant and have been working as a bookkeeper for the last seven or eight years.

A public accountant strictly speaking comes and checks your books. He exercises his own judgment as to the correctness. He does not necessarily follow your entries if he thinks they are wrong, but he adjusts them as to his own reown records. He audits the items.

I have experience in business operations for showing the gross and the net income and dividends and commissions and things of that sort. I have covered a number of industries in my time.

The conversation with Kruse and Hafner was in February or March, 1935, after the 1934 return was to be filed—in the Spring of 1935. It was a 1934 return to be filed in 1935.

When I took off the totals from the books of account showing that 70% was charged to commissions and 151 30% to dividends, I wanted to know something about it. That would be called to the attention of anyone, if it occurred in accounting, to be made a matter of inquiry about the items being deductible. 70% commissions is a very unusual deduction in a business operation.

The deduction of items of expenses incurred in St. Louis, office salaries and little things of that sort which were routine expenses were reflected in the income tax return. The income tax return showed the difference between the gross receipt and the expenditures made for the office in St. Louis. Then it showed 70% of the remainder paid as commission and 30% of the remainder after the commission.

In my experience this deduction from gross income in the income tax return is larger than any I ever saw before. I have had occasion to examine in the operations of companies showing gross receipts and deductions in arriving at net income several hundred times. I have seen deductions of income tax returns setting up a gross and net income and deductions several hundred times in my career.

I have never seen an income tax return where there was a deduction of this magnitude claimed for that particular item.

So then I went to the chief of my office, Mr. Kruse, and asked him why it was a larger amount than I had ever

seen. Then Mr. Kruse told me that it was just an arbitrary figure. That is what I told Mr. Hall, the Assistant U. S. Attorney. Mr. Kruse told me that that was the amount agreed upon at the time the company was formed, at the time of the discussion with Mr. Annenberg Mr.

Hall did not ask me if Mr. Annenberg set the amount.
152 I had no occasion to know anything about what Jim Ragen or his son were doing. I seldom saw either one. I had no connection with their company so I did not know. As far as I knew, they might be connected or around the Socony-Vacuum Oil Company or spend their time in New York or Kansas City or any place. A. W. Kruse came in the office most every day. But I do not know what Kruse was doing. I do not recall working on any books of James Ragen where he got commissions in the run-down business from other companies.

I know that some of these gentlemen got commissions in other companies. Sometimes they would get money from the run-down in Los Angeles. I do not know how that was set up on the books. They get percentages from those companies and I wrote their checks, but I never posted their books so I do not know how they were set up.

On Government Exhibit A-6 there are deductions of \$60,172.23. Out of the total deductions of 85,000 the gross receipts were \$129,000.00. Counsel for defendants asked the witness to state whether or not a casual examination of that item by any one experienced in accounting or having any experience in income tax returns would call for inquiry, under what circumstances those commissions were paid. The District Attorney objected and the objection was sustained on the ground that it was not cross-examination.

On Redirect Examination by Mr. Hall.

When I was in Mr. Hall's office he asked me to tell all I knew about that conversation. I said on cross-examination Ragen and Kruse got money in other run down companies. I mentioned Los Angeles. They got part of
153 the profits from the run down sheets from the business there. It was not incorporated. I don't know that it was Annenberg's, Kruse's and Ragen's individual business in the percentage by which they participated. Kruse was in his office most every day.

On Recross Examination by Mr. McInerney.

I called on Mr. Hall, the Assistant United States Attorney, at his office three times, first in April or May and then again in the summer. Beside Mr. Hall, Mr. Hyland was there the first time and another time. Mr. Tessum and Mr. Busse and Mr. Crilly must also have been there. They all asked me questions about the same thing. My statement was not written down the first day I was there. I told the same story as I told today. I told the same story the second time. The first time I spent two hours there. The second time maybe an hour or an hour and a half. The third just a few minutes, probably half an hour. They did not threaten me. That was before this case came up. I signed a statement about a week ago, the last time I was over there. I signed it in the office the same time it was prepared. I spent very little time reading it. I read it over twice. Read over certain things. Spoke to Mr. Hall to have it changed. I read it over. Mr. Hall brought it back and I signed it. There were two full pages and a little page.

Mr. Hall wanted it mentioned that I knew that Kruse owned stock in the corporation. I stated that I did not know whether A. W. Kruse owned stock in the corporation and asked that that be crossed out. Mr. Hall consented. I remember that Mr. Hall changed some of it as to what Mr. Ragen, Sr. and what Lester and the boys did. Mr. Hall changed it. That was as to what services they performed.

On Redirect Examination by Mr. Hall.

Mr. Hall made every change that I objected to.
154 Before I signed the page Mr. Hall asked me if it was entirely all right.

On Recross Examination by Mr. McInerney.

Mr. Hall wrote what I told him in Mr. Hall's own language. I did not dictate it.

155 JULES TAYLOR, a witness for the Government, testified as follows:

On Direct Examination by Mr. Hall.

I am secretary of the Interstate Brokerage Company, a real estate and insurance company. The Cecelia Company is a majority stockholder. It is an Annenberg Company. I have worked continuously for Interstate Brokerage Company for about twelve years since 1928. I have been a stockholder in various Annenberg companies from time to time. I was a stockholder in the Consensus Company.

My name appears on Government Exhibit 67 on the third page. I was supposed to have subscribed for thirty shares of stock. My name also appears on the 4th page as a member of the First Board of Directors.

I do not recall the organization of the Consensus Publishing Company, but I remember that about twelve years ago I endorsed a certificate of stock. A certificate of the Consensus Publishing Company stock was issued in my name for thirty shares. I do not own any stock. I do not know for whom I held that stock. It was endorsed by me in blank. Nobody ever told me for whom I held it.

I have no knowledge whether the rest of the stock was issued in the names of the people who appear on the third page of the articles of incorporation. I do not know if it was ever issued.

Arnold W. Kruse asked me to endorse a certificate for thirty shares in my name. That was in New York. I do not recall anything that Kruse said to me about the 156 stock certificate at the time. I do not recall having ever seen the minute book of the Consensus Company.

Government Exhibit 59 is a book which the District Attorney showed me in his office a week or two ago. In the forepart of that book the certificate of stock of the Consensus Publishing Company for thirty shares in the name of Jules Taylor is not the certificate endorsed by me in New York in 1929. The certificate in the book is not endorsed.

I never saw any of the other certificates in that book.

Some of the minutes in the book bear my signature up to 1934. I cannot recall when I signed the minutes that

bear my signature. It could have been one at a time or all together because sometimes minutes come through singly or in bunches.

The minutes come to me for signature out of the Chicago office, most likely sent by Mr. Kamin. At times Mr. Kamin sent a fairly sizeable number of minutes of the same corporation for signature all at one time, and those minutes might have been predated for years prior to the time when received.

I do not recall whether that happened in this case because there were many minutes from time to time over the various periods. I never attended a meeting of the Board of Directors of the Consensus Publishing Company and was never present at a discussion of the business of that Company. I was never present at a meeting of the Board of Directors or any other meeting where certain employment contracts were discussed between the Consensus Publishing Company and others.

157 Herbert S. Kamin first entered the employment of the Annenberg Companies in 1933. Shortly afterward, he took charge of all the minute books and has had charge of them since.

The signatures on the sheet in the minute book reading "Proxy by Cecelia Investment Company to Joseph E. Hafner", are those of A. W. Kruse and H. S. Kamin. The proxy is dated September 18, 1930. Kamin was not in the employ of the Annenberg Companies in 1930.

The signatures on another sheet which purports to be a proxy by the Cecelia Investment Company to Joseph E. Hafner are those of A. W. Kruse and H. S. Kamin.

I cannot recall if the stock certificate which I endorsed for 30 shares had the name of the Consensus Publishing Company printed. I do not know who actually owned and held the stock of the Consensus Publishing Company.

I never had anything to do with the preparation or filing or had any knowledge of the tax returns for the company. I do not know how the profits were distributed. I have no knowledge whatever of the operations of the business, yet my name appears as Director in this minute book from 1929 up to 1934.

My contact with Kamin concerned the signing of minutes and some insurance matters. I believe Kamin handled some legal matters for the Annenberg Companies. The majority of the stock books and minute books for all

158 the Annenberg Companies were kept by him in his office. That was a great number—possibly 85 to 100 at one time.

My signature is on Government Exhibit 60, a photostatic copy of an agreement, and the other signatures are of William Molasky, M. L. Annenberg and Joseph Hafner, Notary. I have some recollection of the original. I do not recall at whose request I signed the document, but it would come through Chicago from Mr. Kamin or Mr. Kruse. He witnessed M. L. Annenberg's signature. Mr. Annenberg at times guaranteed the accounts of certain people with publishers whose magazines they distributed. After reading the document, the witness does not recall anything else in connection with signing that in the way of stock certificates. In the usual course of my business I would sign on or about the date of a document of that kind. I do not recognize the handwriting in the upper body of the document.

I had other duties than the one directly connected with the Interstate Brokerage Company. I did not perform any actual work for other companies, but was an officer or director of many of them. For a short while in 1927 or 1928 I did personal work for Mr. Annenberg and occasionally Mr. Annenberg came to New York and wanted him to do a letter.

I listed the contents of a vault of either M. L. Annenberg or Walter Annenberg.

Government Exhibit 126 is one of the vault lists I prepared in New York. It is a list of the vault, either of Walter Annenberg or M. L. Annenberg or possibly a vault in the name of some company. The list was originally made February 20, 1930, and revised September 3, 1931. Government Exhibit 127 is also such a list of vault contents dated April 7, 1933. Opposite number 54 is written "Consensus Publishing Company, 30 shares". At the 159 time the list was made in 1930 and revised in 1931 and in 1933, there was such a certificate in the vault. I cannot tell in whose name the certificate was.

Certificate for 100 shares number 5, dated September 18, 1929 in the minute book was not in the vault at the time the witness made the lists.

Item 54 on Government Exhibit 126, a certificate for 30 shares of Consensus Publishing Company, was in the vault on September 3, 1931. Counsel for defendants admitted Item 54 in all of the lists.

Anything withdrawn from the vault would be scratched off the lists.

The court states that it excluded the list except Item 54 that the District Attorney could read that. The District Attorney thereupon read the following: "The list that is typewritten. The date is February 20, 1930—that is marked out and re-dated September 3, 1931, three pages. On the third page, item 54, Consensus Publishing Company, 30 shares. The top of the exhibit is entitled "Vault contents."

"The next is Government exhibit 128, headed 'Vault contents, September 3, 1931, Item 54', on the third page, 'Consensus Publishing Company, 30 shares.' "

"The next is Government Exhibit 127, entitled 'Vault contents'. The date is April 7, 1933. Item 54 on the second page, 'Consensus Publishing Co. 30 shares.' "

I do not know in whose name that stock certificate in Consensus Publishing Company was. Counsel stipulated that Government Exhibit 59 purports to be minute book of the Consensus Publishing Company and the signatures purported to show on there are the signatures made by the persons whose names appear there. Thereupon, Government Exhibit No. 59 was offered and admitted in evidence. Government Exhibit 67 was also received in evidence.

On Cross-Examination by Mr. McInerney.

The Cecelia Company, the holding company, came into being a few years after 1924. It had another name before. It was a company in which Annenberg had most of his holdings. He held in that company stock in a great many other corporations in the last five or eight years. I was an officer and director in a great many of them, possibly ten or fifteen. I was a stockholder in many companies and in most of them paid nothing for the stock. Annenberg gave it to me in my name and I signed whatever I was asked to. I paid no attention to the runnings of the corporation. I was a dummy for the Annenberg Companies. Mr. Kamin or whoever prepared the minutes would send them down to me in large quantities. I never read them unless there was something unusual about them. But it did not mean anything to me. I was not interested

in what they contained. I assumed they were correct and did not care one way or the other about it.

I had nothing to do with the vault lists of later years. When they moved everything to Chicago in early 1933, everything went to Chicago, including the vault contents. There were no longer any vaults in New York that I had anything to do with. The last list made up was February 16, 1933. From that point on they were transferred to Chicago. If there were any lists, I had nothing to do with them. I was a party defendant in this case indicted by the Grand Jury. I have been dismissed. I testified before the Grand Jury. I do not recall making any statement to the Government prosecutor before I testified before the Grand Jury. There were a very few questions asked me by the Grand Jury. I told them I had no interest in the company--that I was merely a dummy,--that I did not know anything about it from beginning to end. But still I was indicted.

Everything I signed for the Consensus Company and everything I did was done because I believed Mr. Kamin gave me proper things to sign, and I assumed that they were correct. Kamin was admitted as an attorney in Michigan. He was a relative of Annenberg by marriage, and works for the Annenberg Companies in Chicago. I do not know just what his function is, or was. I know that Kamin prepared the minutes of all the corporations. I believe that Kamin did them accurately and properly and that everything I signed was perfectly honest and legal, and that he was perfectly honest and legal in everything he did. The witness had no reason to suspect that there was anything illegal about any of the operations of the Consensus Company or on the part of Annenberg, Kruse, Ragen or anybody else.

Thereupon GOVERNMENT EXHIBIT 60 was offered and received in evidence.

162 GORDON BROOKS, a witness for the Government, testified as follows:

On Direct Examination by Mr. Hall.

I am manager for a wholesale magazine distributing company employed by William Molasky at the Pierce Building News Company, St. Louis, Mo. I was first em-

ployed there in 1925 and have been there ever since continuously.

I first knew of the Consensus Publishing Company about 1930 while working for Molasky. I have done work in connection with it, keeping the record of receipts and expenses which constituted most of the work. I prepared the weekly reports that Molasky sent to the Chicago office showing the receipts and disbursements.

The business of the Consensus Publishing Company was printing and selling run down sheets in St. Louis and Cincinnati, and vicinities.

Some days this work would take at least an hour of my time and sometimes more. One day a week I might spend three hours, the day I made up the reports. The other days I spent an average of about an hour and a half. There were other people employed by the Consensus Publishing Company in St. Louis, George Hire, Lyle West, John Kennedy, printers.

163 Q. Yes. When the two that you gave us first were working, how many were employed by the Consensus Publishing Company?

A. In the print shop?

Mr. Struett: I object to that, your Honor, as immaterial.

The Court: What is the materiality of it, Mr. Hall?

Mr. Hall: Why, if the court please, this is right in line with the element of work that was done, and it is proper to show that in these cases. I can give you a case here, the Allegheny Amusement Company and a lot of others. Those are vital matters in this case, how much work and who did it.

The Court: Well, isn't it admitted in this case that all of the labor that was done down in St. Louis was paid for in cash in the way of expense, all the printing material and everything?

Mr. Hall: That is right, but I am entitled to and I have to show the amount of work, if I can.

The Court: You are not attacking the amount, the correctness of the amount that was paid out by way of expenses from week to week as shown by these weekly reports?

Mr. Hall: No, I am not.

The Court: And that covers all of the labor and material that was done down there except what this man did and what Molasky did, did it not?

The Witness: Yes, sir.

The Court: Now, whatever may have been paid to them does not affect the question of the reasonableness or the unreasonableness, or the propriety or the impropriety, of the payment to Molasky.

Mr. Hall: That is true.

The Court: Well, then, why pursue it?

164 Mr. Hall: I was not going to ask how much they were paid for that. I won't pursue it in view of your Honor's analysis of it, but my purpose, my efforts were to show as nearly as I could how much work was required in that business. That is all.

The Court: Well, it was paid for in these weekly expenses.

Mr. Hall: That is in terms of money, not in terms of men or of hours. It is merely in terms of money.

The Court: Yes.

Mr. Hall: But I won't pursue it in view of the court's analysis, but that was my object.

Q. You were in supervision of that work, were you?

A. Yes sir.

Q. Did that work require very much supervision?

A. No.

Q. Did it practically operate itself after it was started?

Mr. McInerney: I am going to object to that, your Honor, "practically operate itself," a business.

The Court: Well, your compensation was included in this weekly report of expenses, wasn't it?

A. No, I work for Mr. Molasky as the Pierce Building News Company manager. You see, he gave me the salary and whatever he asked me to do I did, regardless of what it was.

Q. Whether it was the Consensus Company or something else?

A. Yes, sir.

Q. And your best judgment is that you put in an hour and a half on the average per day in the Consensus work?

A. That is right, your Honor.

165 Q. You did all the supervising work?

A. Well, there wasn't much supervision.

Q. Well, you did it all, did you?

A. Yes, sir.

Q. Nobody else did any of it?

A. No.

I received checks from the Chicago office payable to William Molasky, representing 30% of the profits. If Molasky was in the city, I usually gave them to him, if not, I deposited them in Molasky's account. I recall when the checks were changed and half of the amount was issued in a check payable to Molasky and another half issued in a check payable to B. Hoffman, I gave B. Hoffman's checks to Molasky. I never deposited any of her checks in Molasky's bank account. B. Hoffman was not connected with Consensus Publishing Company, and as far as I know, never did any services for Consensus Publishing Company. She was, as far as I know, never in the offices in St. Louis. B. Hoffman is a niece of Mr. Molasky.

I deposited the receipts of the Consensus Publishing Company in its account in the Mississippi Valley Trust Company. The check book on that account was kept in Chicago.

I know Arnold W. Kruse. I saw him twice in St. Louis around 1934 or 1935. I don't know James M. Ragen and never saw him in the office of the Consensus Publishing Company in St. Louis.

166 Molasky told me when the divisions between Molasky and B. Hoffman of the 30% that had formerly gone to Molasky took place, but I couldn't state when. Molasky told me that instead of one check payable to Molasky, I would receive two checks each week, one to B. Hoffman, half the usual check, and the other one would be payable to him. I received the checks and endorsed the checks for B. Hoffman and gave them to William Molasky, but not all, if I wasn't there Molasky got the checks. I never discussed this business with B. Hoffman nor furnished her a statement of any of these proceeds.

I never met Lester Kruse and could not recognize him, nor ever saw him in the St. Louis office of the Consensus Publishing Company.

I don't know James M. Ragen, Jr., to see or talk to him or recognize him, and never saw him in the St. Louis office, although I talked to him over the phone lots of times, but never met him personally.

The witness identifies checks issued in the name of B. Hoffman as endorsed "William Molasky per Gordon Brooks" and "B. Hoffman" in her writing. I can't say that I have deposited those checks in any bank account.

I have seen Government Exhibit 124 before, but I don't know where or who showed it to me.

Molasky gave me instructions to endorse B. Hoffman's checks, Molasky just said he had a power of attorney to do it and told me to indorse them if he wasn't there. I gave the checks to Molasky. I don't remember what 167 I did if Molasky wasn't there, whether I deposited them, or held them until Molasky came back. I had no power of attorney from B. Hoffman. I was never authorized by her to indorse checks payable in her name.

Exhibit 124 is a letter signed "Miss B. Hoffman" and authorizes William Molasky to endorse B. Hoffman's checks.

Every time I deposited a check for William Molasky, I put it in the same account at the Mississippi Valley Trust Company. When I indorsed some of B. Hoffman's check and deposited them in Molasky's account, they went into the Mississippi Valley Trust Company. When Molasky indorsed checks payable to her and they were deposited in his account, they went into the Mississippi Valley Trust Company. I never cashed any of these checks and gave B. Hoffman the money.

On Cross-Examination by Mr. Baron.

Molasky worked for the Consensus Publishing Company. Molasky travelled to various cities opening up accounts.

When I stated that I did practically all the supervising work, I meant with reference to printing of the sheet only. The conduct of the rest of the business was all done by Mr. Molasky. All the instructions came from Mr.

Molasky. In the absence of Molasky, I called Ragen 168 or Kruse in Chicago to get instructions. Molasky was absent a large part of the time.

I first heard the name of Consensus Publishing Company around 1930. It might have been a little earlier. On being shown an agreement between Molasky and Zweig, the witness stated it must have existed in 1928.

After September 1929, Molasky was absent quite often from St. Louis, two or three days a week. He would go on extended trips to Florida and California during that period from 1929 to 1936. Sometimes he would come to Chicago two or three times a week. He also went to Columbus, Louisville, Dayton and Lexington.

During his absence, I would consult Kruse or the Ra-

gens about various customers that cut their order on cards and run-downs. Molasky told me if, while he was gone, there were any questions to take up, to call Mr. Ragen. When I told Ragen about the customers cutting down their business, he would say "O. K.", I will take care of it and keep in touch with me", and Ragen would probably call back and say that the order was raised again.

The witness was asked what Ragen said.

On objection by the United States Attorney, the court sustained the objection.

When Molasky went to Columbus, Lexington, Dayton and other cities named, he went on business for Consensus Publishing Company.

169 When I said I talked to Ragen, I meant to say Ragen and Ragen, Jr., and I talked to Kruse and Kruse's son too. If Ragen wasn't in, I would ask to talk to Kruse. If Kruse wasn't in, I would ask to talk to his son, Lester.

The Consensus Publishing Company also had a printing plant in Cincinnati from which distribution of run down sheets was made. I had nothing to do with the Cincinnati Printing. I just got a report each week from them, how many were printed and where they were sent to. That was embodied in the weekly report of receipts gotten up in St. Louis and sent on to the Chicago office of the Consensus Publishing Company.

Redirect Examination by Mr. Hall.

I testified that I never saw Lester Kruse. I do not know how old he is. I don't remember when I talked to him over the telephone. I haven't any idea when I talked to him. I called up Lester Kruse a couple of times. If Ragen wasn't in, I would talk to A. W. Kruse and if he wasn't in, to Lester Kruse. I talked to Lester Kruse on the telephone about run-downs, something about Louisville. The Cincinnati office sent me a list of their subscribers, so I had a list to know who to send the bills to. I talked to Lester Kruse about Louisville. There has been trouble there at times. Somebody else was putting

170 out a run down sheet. I do not know how long ago

I talked to him, whether a year or 2 years ago. I believe I talked to Lester Kruse twice over this period.

Surlin distributed the run down sheets in Cincinnati long ago before the present man. Surlin was also work-

ing for Molasky. He was our run down distributor. He was not on the payroll of Consensus. He gets a commission on every copy sold.

The American Racing Record printed the sheets for Cincinnati. They were paid so much a week for printing them. Surlin who was with the news distributing agency sold them and collected the money. He took his commission out and sent it in to St. Louis. Consensus did the printing. It had no printing plant in Cincinnati.

The signature on Government Exhibit 120 is that of William Molasky.

Government Exhibit 119 bears the signature of Molasky. The initials, "J. V." are the stenographer's.

The Government offers its EXHIBITS 117, 118, 119, 120.

Objection by counsel for defendants on grounds: the letters are not binding on any defendant but the person who wrote them.

The court ruled Exhibits 119 and 120 will be received as against Molasky, subject to the objection made by the other defendants.

171 GOV. EXHIBIT 119 is a letter dated January 6, 1933 from Mr. Molasky to Mr. Kruse as follows:

Mr. Arnold Kruse,
Chicago Daily Racing Form,
441 Plymouth Court,
Chicago, Illinois.

Dear Arnold:—

I would appreciate if you would give me as soon as possible a list of how I should make out my income tax, whether or not as dividends, salary or commissions, showing me what to list New Orleans if there is a profit, also Kansas City and Consensus Publishing Company.

I would like to get this information around the first of February.

Yours very truly,
The Pierce Building News Co.,
Per: William Molasky.

GOV. EXHIBIT 120 is a letter dated February 14, 1933 from Mr. Molasky to Mr. Kruse as follows:

Mr. Arnold W. Kruse,
441 Plymouth Court,
Chicago, Illinois.

Dear Arnold:

Received your letter of February 13th.

Just as soon as I receive the check-book for the R-D Publishing Company, I will sign checks and send them back to you immediately.

Regarding income tax, when I see you personally, I can explain better than I can writing to you.

I am sorry I cannot join you on the Florida trip and I hope both you and your wife and Lester have a wonderful time. Say "Hello!" to the crowd for me.

Yours very truly,

William Molasky."

173 CLARENCE C. SANDBERG, a witness for the Government, testified as follows:

On Direct Examination by Mr. Hall.

My name is Clarence C. Sandberg. I live at 2416 North Kostner Avenue, Chicago. I am a bookkeeper for the Cecilia Company and have been so employed for four years, since September of 1936. I was employed by Joseph E. Hafner, and I was assigned bookkeeping for various Annenberg companies. These companies printed racing forms and published magazines and run-down sheets. I kept books for four Companies. The Consensus Publishing Company was one of them. Joseph E. Hafner was my immediate superior, and A. W. Kruse was in charge of the offices. I worked on the general ledger, cash book and journal of the Consensus Publishing Company. Gov. Exhibit GL-1 is the general ledger, and J.1 is the journal, and CB-2 is the cash book.

I received typewritten reports of the receipts and disbursements for expenses from Mr. Molasky at St. Louis each week. I entered them in the cash book and in the journal, and from these reports I made up my work pa-

pers. Gov. Exhibits WP-28 and 29, are work papers which I made up from Mr. Molasky's sheet. My work starts on WP-28, in the column headed 9/26; that is, September 174 26, 1936, and the figures in that column and the following ones on that exhibit, as well as on WP-29 are in my handwriting. The words "Dividends and com." on WP-28 are in Mr. O'Donnell's handwriting. He worked on the books before I did. The column headed "Receipts and expenses, profit, bank account, disbursements and balance," commencing on WP-29 are in my handwriting. Gov. Exhibits WP-30 to WP-34, inclusive, are also work sheets that I made up from the sheets that Molasky sent in each week. These contain the same information as the others. They show the receipts and disbursements and the balances that were paid out after the payment of all operating expenses. At the bottom, under "disbursements," the heading "dividends and commissions" is in my handwriting on these sheets. They go through 1937, approximately. On WP-32, under the heading "disbursements," the word "dividends" is in my handwriting, and that is all there is on that line on that page—just dividends. This heading includes entries showing the division of the earnings to the Cecelia Company, Lester Kruse, James M. Ragen, Jr., and William Molasky after payment of expenses.

Referring to Gov. Exhibit WP-33, the word, "Dividends" under "Disbursements" was not written by me. The figure work on WP-33 is in my handwriting, but the column referred to was written by somebody else for me. I don't remember who. The writing was there when I did the figure work on the sheet. The sheet is in the same condition now as when I put the figures on. Gov. Exhibit WP-34 has the same information that I placed on the other sheets, and in the lefthand column the heading "Receipts," 175 "Expenses," "Profits," "Bank Account," "Disbursements." and "Balances" are typewritten. The typewriting was there when I put the figures on.

Under the heading "Disbursements" is typewritten the word "Dividends," and following appears "and Commissions," printed in ink. I printed those words after the word "Dividends," but I did not write those words on WP-33. I don't know when I wrote "and Commissions" on WP-34. I don't know whether somebody instructed me to write it on or not. The cash book, Gov. Exhibit CB-2, shows that 20% of the earnings of the Consensus Publishing Company in 1936 were paid to Lester Kruse and in

1937 20% of the balance of the earnings after payment of expenses was paid to A. W. Kruse. I drew the checks for that 20%, payable to Arnold W. Kruse, commencing January 15, 1937. The 20% was shifted from Lester A. Kruse to Arnold W. Kruse commencing in January of 1937, pursuant to a telegram, Gov. Exhibit 115, sent by Arnold W. Kruse to Joseph E. Hafner. GOV. EXHIBIT 115 offered and received in evidence and is as follows:

"Do not make out any Consensus commission checks until I come back as changes to be made transferring commissions to me instead of Lester.

A. W. Kruse."

This telegram also bears handwriting notation of Mr. Sandberg as follows:

"Lester Kruse checks charged A. W. Kruse. Effective 1/2/37 per A.W.K. 1/15/37."

Mr. McInerney: I am not objecting to this character of testimony on the part of Ragen. I assume your Honor's ruling is general, that it will be limited later unless there is some connection.

176 The Court: It must be limited unless there is some connection of course. I will take care of that in my charge to the jury.

Mr. McInerney: I think it would save time to make the kind of objection I have already made.

The Court: I assumed that I had made my position clear on this. Of course, you have a right to preserve the record as to all evidence that you think is immaterial as to any particular defendant but I assume that there is no necessity of repeating that objection because I must follow the law in my charge to the jury and it mechanically and automatically takes care of the situation when I charge the jury on the law. If I do not do so, why you should call it to my attention. But there is no necessity—your record will be preserved without the renewal of the objection each time.

When I made out the distribution checks for Mr. Kruse, I also made out similar checks to James M. Ragen, Jr., and Mr. Molasky and the Cecelia Company, during the period I worked on the books. I still work on them. I did not enter the checks payable to Lester A. Kruse in 1936 in Arnold W. Kruse's cash book. In 1936 I drew distribution checks payable to B. Hoffman and William Molasky. The check to B. Hogman was for 15% of the

balance of the profits, and the check for an equal amount, also 15%, was drawn payable to Molasky for the remainder of 1936. In 1937 no checks were drawn payable to B. Hoffman, but a check was drawn payable to William Molasky in 1937 for 30%. In 1937 the percentages were 30% to Cecelia Company, 30% to Molasky, 20% to Arnold W. Kruse, and 20% to James M. Ragen, Jr. I must have had instructions to quit drawing checks for 15% of the remaining profits to B. Hoffman and to draw a check for 30% to William Molasky in 1937. I don't know who instructed me.

177 Gov. Exhibit A-8 is the office copy of the income tax return of the Consensus Publishing Company for the year 1936. I made it out. A portion of it is in my handwriting. Joseph E. Hafner asked me to make it out. In that copy I deducted as expense those percentage payments, except those to the Cecelia Company. This was the set-up on the ledger, and I followed the ledger. Joseph E. Hafner told him to follow the ledger. (Gov. Exhibits WP-30 to WP-34, both inclusive, offered and received in evidence.)

On Cross-Examination by Mr. McInerney.

The entries in Government Exhibit CB-2, the cash book, payable to James M. Ragen, are November 13th, and 20th, 1936, check Number 949 was \$749.49 and check number 956—November 20, 1936 for \$444.07. Check Number 949 is payable to J. M. Ragen, Jr. and bears his endorsement. Check Number 956 is payable to J. M. Ragen, Jr. and bears his endorsement. Those two entries that purport to reflect those checks are just wrong entries which proves that it is human to err.

The work papers are made up from the weekly report sent up from St. Louis and a telegram that comes in the latter part of the following week reporting the receipts on the previous week's sales. These are entered in the work papers before they are put in the cash book. The information as to the percentages of the checks for dividends and commissions was handed down to me from my predecessor. The disbursements of commissions and dividends are first entered in the cash book.

178 There is no entry in the cash disbursement book that has any different designation than "Commissions" except for the payment to Cecelia. Referring to the 70 per cent in commissions to the individuals that is all

shown under the "Commission" column in the cash disbursements book. None of those commissions are referred to as "dividends" in that book. Nothing is referred to as dividends in that book other than the portion payable to the Cecelia Company.

Government Exhibit CB-2 which covered from June, 1935 is the cash book. That was the book of original entry. The check book stub shows the original split up of the dividends and commissions. The check is issued before any entry is made. The first entry in a book showing the payments to individuals is in the cash book Government Exhibit CB-2. The work papers are made weekly. The posting in the cash disbursement ledger are made at the end of the month.

I reconcile an entry as "dividends" in the work sheet where the only dividend shown in the cash book is dividends to Cecelia in this way:

The item shown on the work sheet is "Dividends and Commissions." In some places, it does not say "Commissions." That is an error, possibly an oversight in writing up the work sheets. As far as the witness knows for the time he kept the books, that is the only record where the error was made. There is no error in any other book that the witness kept that says "Dividends" where it is "commissions."

179 There were representatives of the Government of the Department of Internal Revenue in the office where the witness worked during the time he worked there. They were there prior to the time the witness was employed. They were there when he arrived. The witness did not work directly with them. He helped in getting materials together for them and got material relative to Consensus Company for them. He does not remember exactly what that material was. He assisted in getting the general ledger, the cash book and the journal and all the necessary papers applicable to those. By necessary papers, he means papers that were requested of him to see if he could find what they wanted. They were the work sheets that came from St. Louis every week. The witness does not know if they were any of the Chicago reports that were issued by the office every week. The witness gave them the weekly reports from St. Louis, from September 1936 on, and for 1937. The witness doesn't know if they asked for any information for prior years at that time. The books in the court room were all there in the office then, the cash dis-

bursement book, the journal and the ledger. I don't know whether I showed them to them or someone else did. The witness' superior told him to get certain books and papers and give them to the Government. All these books were in the office and the government people were in the office working on the books. They were there for about all of a year, a year and a quarter ago. They were there continuously, from before the witness got there until some time in 1939.

180 The books and records of the Consensus Publishing Company were subpoenaed. The last time the witness saw them in the office was in May of 1939. Since then, the books have not been in the office. The gentlemen from the government never asked me for any of the income tax returns or the retained copies thereof in 1936 and I don't know whether they saw or examined them. The witness has not seen them until today. During the period from 1936 to April, 1939, the Government people were in the witness' office, at some time or other. There was no change in the bookkeeping with reference to the Consensus Company's disbursements of dividends and commissions during that time.

The witness' understanding of "Annenberg Companies" is to be any companies or affiliates of Mr. Annenberg, affiliated companies of Mr. Annenberg which he either owned or had an interest in by means of the Cecilia Company.

On Redirect Examination by Mr. Hall.

I assisted in picking up records to send over to the government under a subpoena. I did not give the government agents any records. I had no authority to give anything. I did not give them Molasky's weekly reports. I helped to get the records together in May of 1939. The work sheets were prepared first, in order to find out how much of the profits were left to be distributed. I had to prepare the work sheet before I could make any entries about the individuals in the cash book. I don't remember giving these work papers to the revenue agents in the office of the companies where I was working. The agents were investigating companies in addition to the Consensus Publishing Company.

181 GILBERT MEYER, a witness for the Government, testified as follows:

Direct Examination by Mr. Hall.

That he was a bank clerk employed in the auditing department of the First National Bank, Chicago and he in turn identified their various records, in so far as they pertained to the accounts of the Consensus Publishing Company, Arnold W. Kruse, Alma Kruse, his wife, and Lester Kruse. These records included the ledgers, deposit slips, signature cards, etc. These records so identified and later received in evidence appear with their proper identification numbers in the list of government exhibits admitted in evidence under the heading "Exhibits of First National Bank of Chicago," which list is included as a part of this Bill of Exceptions.

Gov. Exhibit FN-2, which is the signature card for the savings account of Arnold W. Kruse, No. 976355, bears the signature of Arnold W. Kruse. On March 8, 1938, the signature of Lester Kruse was placed on that card. It was not on the card when the account was opened. Prior to March 8, 1938, only Arnold Kruse could withdraw money from account No. 976355. Lester Kruse could not. Gov. Exhibit FN-22 is the resolution of the Consensus Publishing Company filed with the bank, showing the 182 people authorized to draw on the Consensus Publishing Company Account. This resolution has not been changed, and the same people are still authorized to draw under that resolution, namely, William Molasky, Arnold W. Kruse, H. L. Annenberg, and James M. Ragen. The account was closed in 1934, and the resolution continued up until it was closed. Gov. Exhibit FB-20 is the signature card in connection with the checking account of Lester Kruse. The account was opened on November 27, 1934, and on November 26, 1934, the day before the account was opened, there was placed thereon the authorized signature of "Lester Kruse by Arnold W. Kruse" and a power of attorney was filed in connection with this.

183 EUGENE J. WALTER, a witness for the Government, testified as follows:

Direct Examination by Mr. Hall.

That he was and is the Assistant Vice President of the Mississippi Valley Trust Company of St. Louis, Missouri, and that the records of that company are kept under his supervision and control.

This witness identified various records of the bank insofar as they pertain to the accounts of the Consensus Publishing Company and William Molasky. These records included ledger sheets, signature cards, deposit tickets, loan ledger sheets, resolutions authorizing withdrawals from accounts, credit files, bank statements, etc. These records so identified and later received in evidence appear with their proper identification numbers in the list of government exhibits designated as "Exhibits of Mississippi Valley Trust Company, St. Louis, Mo.", which list is included as a part of this bill of exceptions.

Government's Exhibit MVC 6 is the credit file of William Molasky with the Mississippi Valley Trust Company. Pages R to K of this exhibit contain a financial statement of William Molasky dated February 8, 1933, which was prepared and submitted by Molasky to the bank in connection with his application for a loan at or about that time. This financial statement contains the following notation, the substance of which was given orally to the witness by Mr. Molasky:

184 "Consensus Pub. Co. 441 Plymouth Court
(an Ill. corp.) Chicago, Ill. 30 shares

Total capital 100 shares

1932 Income from this investment \$24,537.65. Mr. Molasky considers that this 30 shares is worth not less than \$100,000.

(Print Racing Publications) Sell all over U. S."

Government's Exhibit MVC 6-A-5, which is a typewritten document containing information submitted by William Molasky in connection with his application for a loan of \$50,000.00 from the Mississippi Valley Trust Company, bears the following typewritten notation:

"30 shares Consensus Publishing Company out of 100 shares publishing race information in St. Louis, Kansas City, Cincinnati, Dayton and Columbus, Ohio. My dividends on this in 1932 were about \$20,000.00."

Government's Exhibit MVL 1 contains a record of loans made by the Consensus Publishing Company from the Mississippi Valley Trust Company and shows that on April 9, 1930, the Mississippi Valley Trust Company loaned the Consensus Publishing Company \$20,000.00 on a note which was endorsed by William Molasky, A. W. Kruse, M. L. Annenberg and James Ragen.

The line through James M. Ragen on Government Exhibit 205 was put there April 5, 1935. The signature remained in effect until that date.

Cross-Examination by Mr. McInerney.

The minutes on page 17 of the Consensus Minute Book are the resolution, a copy of which the witness has, dated September 18, 1929. The minutes dated April 5, 1935, are the minutes for the other resolution the witness has.

185 I do not know whether the Consensus Publishing Company was a corporation on December 31, 1928.

Cross-Examination by Mr. Struett.

To the best of my knowledge all the records of the Mississippi Valley Trust Company concerning the account of the Consensus Publishing Company are being produced here.

Mr. Hall: May I say to counsel before the Court, if the Court please, during the investigation Mr. Kruse gave to the revenue agents his cancelled checks on his accounts and on his son's accounts and photostats were made of those checks and the checks were returned to Mr. Kruse. We had no further use for them. We have the photostats here, and we are going to offer them.

Whereupon, the Government introduced in evidence photostatic copies of the various cancelled checks covering Arnold W. Kruse for the period from 1933 to 1936, both inclusive, and covering Lester Kruse for the period from 1934 to 1936, both inclusive, drawn on the different accounts. These exhibits with their proper identification numbers appear on the list of government exhibits admitted in evidence, which list is included as a part of this bill of exceptions.

186 GILBERT DILTHEY, a witness for the Government, testified as follows:

Direct Examination by Mr. Hall.

My name is Gilbert Dilthey. I live at 538 Park Lake, St. Louis, Missouri. Prior to about a year ago, I was employed by the Stobie Photo Company, St. Louis, Missouri, and had been so employed for approximately four and one-half years, including the year 1938. I produce under subpoena all of the papers of the Stobie Photo Company relating to the photostating of certain stock certificates for William Molasky.

On June 21, 1938, Mr. Molasky brought to the Stobie Photo Company two original stock certificates to be photostated. They were photostated by the Stobie Photo Company, and the original certificates and photostatic copies were later delivered to Mr. Molasky, for all of which he paid the sum of \$2.00.

Government's Exhibits 107 and 108 are the true photostatic copies made of the original stock certificates brought in by Mr. Molasky.

Government's Exhibits 107 and 108 were offered and received in evidence without objection. Government's Exhibit 107 is as follows:

187 GOVERNMENT EXHIBIT NO. 107.

Incorporated Under the Laws of the State of
Illinois

Number _____ (Cut) _____ Shares _____

Consensus Publishing Company

Capital Stock 100 Shares Without Par Value

This Certifies that William Molasky is the owner of Fifteen Shares of the Capital Stock of Consensus Publishing Company, fully paid and non-assessable, transferable only on the books of this Corporation in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed this Third day of January, A. D. 1933.

William Molasky,
-President.

Howard Clark,
Secretary.

For value Received hereby sell, assign and transfer unto Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint Attorney to transfer the said stock on the Books of the within named Company with full power of substitution in the premises.

Dated 19.....
In Presence of

Notice: The Signature to This Assignment Must Correspond with the Names as Written Upon the Face of the Certificate in Every Particular Without Alteration or Enlargement or Any Change Whatever.

Certificate
for
.....
Shares
of the
Capital Stock
Issued to
.....

Dated
.....

189 Government's Exhibit 108 is as follows:

GOVERNMENT EXHIBIT NO. 108.

Incorporated Under the Laws of the State of
Illinois

Number (Cut) Shares

Consensus Publishing Company

Capital Stock 100 Shares Without Par Value

This Certifies that Miss B. Hoffman is the owner of Fifteen Shares of the Capital Stock of Consensus Publishing Company, fully paid and non-assessable, transferable only on the books of this Corporation in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed this Third day of January, A. D. 1933.

William Molasky,
President

Howard Clark,
Secretary.

For value Received hereby sell, assign and transfer unto

..... Shares
of the Capital Stock represented by the within Certificate,
and do hereby irrevocably constitute and appoint

..... Attorney
to transfer the said stock on the Books of the within named
Company with full power of substitution in the premises

Dated 19.....
In Presence of B. Hoffman.

Notice: The Signature to This Assignment Must Correspond with the Names as Written Upon the Face of the Certificate in Every Particular Without Alteration or Enlargement or Any Change Whatever.

Certificate
for
.....
Shares
of the
Capital Stock
Issued to
.....

Dated
.....

190 Statement by counsel:

Mr. Struett: I want the audit reports made by the various auditors of the Bureau of Internal Revenue that went in there in 1932, and audited Mr. Kruse's account, audited Lester's account and audited the Consensus account and I have asked for them now since the first day of this trial.

Mr. Hall: If the court please, he is asking for some records that I do not have and that apparently are the confidential records of the Bureau of Internal Revenue. I have no power to ask the Bureau of Internal Revenue to deliver to defense counsel some of their private papers. Counsel knows it is against the law, it is against the regulations and I haven't got those. I don't think it is material to this case either.

The Court: The only thing that is before the court at this time is the identification of the exhibits that have been offered. You have read the identification and that matter has been made a matter of record. Now, I don't know that this has anything to do with that.

191 MEYER M. EISENBERG, a witness for the Government, testified as follows:

On Direct Examination by Mr. Hall.

My name is Meyer M. Eisenberg. I live at 5519 Jackson Boulevard, Chicago. I am secretary of the Corporation Supply Company, a corporation. Have held that position continuously since 1929.

Government's Exhibits 61, 62 and 63 are records of

that company, showing that on September 23, 1929, the Consensus Publishing Company purchased a stock book, corporate seal and 50 printed certificates with the name "Consensus Publishing Company" printed on each certificate. These articles were paid for and delivered to the Consensus Publishing Company. Government's Exhibits 107 and 108 are true photostatic copies of the original certificates of stock of the Consensus Publishing Company that were purchased by that company on September 23, 1929 from the Corporation Supply Company. The name of the Corporation Supply Company appears on both of them. The cancelled certificates of stock attached in the front of Government Exhibit 59, the first certificate being for 30 shares in the name of William Molasky, the second one for 30 shares in the name of Jules Taylor, the third for 20 shares in the name of Howard Clark, and the fourth for 20 shares in the name of Thomas Ryan, are not the certificates of stock that were purchased by the Consensus Publishing Company from the Corporation Supply Company in the transaction I have heretofore referred to.

192 *On Cross-Examination by Mr. McInerney.*

The Corporation Supply Company sold to the Consensus Publishing Company a stock certificate book with 50 certificates in it, a corporate seal and a minute book. Government Exhibit 59 is the book the Corporation Supply Company sold to the Consensus Publishing Company in September, 1929. The records of the Corporation Supply Company do not disclose any other purchase by the Consensus Publishing Company of a corporate minute book since 1929. Government Exhibit 59 is the only book that they sold of that type.

On Redirect Examination by Mr. Hall.

The binder, the index, the paper and everything in Government Exhibit 69 are the same, now as when sold. The paper contained in Government Exhibit 69 when we sold it was plain paper. The last sheet of paper is not paper that we sold.

On Recross Examination by Mr. McInerney.

The Corporation Supply Company sold Consensus, from the beginning of the book up to and including page 31. They were all printed, but were in blank forms without typewriting filled in. They were part of the book as delivered.

193 HERBERT S. KAMIN, a witness for the Government, testified as follows:

On Direct Examination by Mr. Hall.

I am an attorney, employed as such by the Annenberg Companies. I have custody of their various minute books and stock books, made up the minutes, stock certificates, and handle other office legal matters for them. I was first employed in the Spring or Summer of 1931 by Herbert Krancer, representing the American Racing Record Corporation. Krancer was my superior and remained that for some time. I worked for him until the Summer of 1933 in the editorial department of the American Racing Record, doing no legal work whatsoever. The American Racing Record was an Annenberg Company.

In the Summer of 1933 I was transferred to Arnold W. Kruse's office in the Racing Form building. I was employed by Kruse.

I was formerly a defendant in this case. Since then I have been dismissed out. No promises were made to me in connection with my dismissal or otherwise concerning the testimony I would give on this trial.

When I commenced work under Kruse, Kruse was my superior. The thing I first started to do was to put the various minute books and stock books in order because minutes for meetings of their various corporations had not been held for a good number of years and the thing was in pretty much of a mess. That occupied my time for a good while. I took charge of the minute books and stock books of most of the Annenberg Companies, including those of the Consensus Publishing Company. My employment has continued the same up to the present. I received instructions from Kruse from time to time in connection with my work.

194 After I commenced my work I saw the minute book and stock book of the Consensus Publishing Company. The original stock book has been destroyed. There were stubs in that book, one in the name of Jules Taylor for 30 shares. I don't know what names the other stubs were. The stubs in Government's Exhibit 59 are not exactly the same as the issued stubs in the old stock certificate book when I first saw it. There were some transfers. There were other stubs besides the one in the name of Jules Taylor for 30 shares. All of the stubs called for one hundred shares. The stubs would call for 100 shares all together.

The stock certificate in Government Exhibit 59 issued in the name of Jules Taylor and the stub therein of the certificate issued to Cecilia Publishing Co. are as follows:

195 GOVERNMENT'S EXHIBIT 59.

Certificate No. 5

For 100 Shares

Issued to

Cecelia Investment Co. of Chicago, Illinois

Dated September 18, 1929

Transferred from

| Dated | | 19 |
|------------------------------|-------------------------|----------------------------|
| No. of Original Certificate. | No. of Original Shares. | No. of Shares Transferred. |
| 1 | 30 | 30 |
| 2 | 30 | 30 |
| 3 | 20 | 20 |
| 4 | 20 | 20 |
| | — | — |
| | 100 | 100 |

Received this Certificate

..... 19

Surrendered 19

New Certificate No.

Issues 19

To

Address

196

Certificate No. 2

For 30 Shares

Issued to

Jules Taylor of New York, N. Y.

Dated September 18, 1929

Transferred from Original Issue

Dated 19.....

| | | |
|---------------------------------|---------------------------|-------------------------------|
| No. of Original Certificate. | No. of Original Shares | No. of Shares Transferred. |
|---------------------------------|---------------------------|-------------------------------|

(Cancelled stamps.)

Received this Certificate

19.....

Surrendered Sept. 18 1929

New Certificate No. 5

Issued September 18, 1929

To Cecelia Investment Co.

Address Chicago, Illinois

Incorporated Under the Laws of the State of
Illinois

Number

2

(Cut)

Shares

30

Consensus Publishing Company

Authorized Capital 100 Shares No Par Value

This Certifies that Jules Taylor is the owner of Thirty
(30) Shares of the Capital Stock of

Consensus Publishing Company

fully paid and non-assessable, transferable only on the
books of this Corporation in person or by Attorney upon
surrender of this Certificate properly endorsed.

In Witness Whereof the said Corporation has caused this
Certificate to be signed by its duly authorized officers and
its Corporate Seal to be hereunto affixed this 18th day of
September A. D. 1929.

Howard Clark,

H.C.

Secretary

William Molasky,

W. M.

President.

197 For value Received hereby sell, assign and transfer unto Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint Attorney to transfer the said stock on the Books of the within named Company with full power of substitution in the premises.
 Dated 19..... in the Presence of J. T.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

Certificate

(Cut)

of the
 Capital Stock

(Cancelled stamps.)

Consensus Publishing Company

Issued to Jules Taylor

Dated
 September 18th, 1929.

(Seal)

198 I destroyed that book because I made a new stock book which reflected the ownership of the stock. Kruse advised me that the Cecilia Company should have owned all of the stock of the Consensus Publishing Company from the beginning, that the stock in the Consensus Company was issued incorrectly and there had been some transfers of that stock and that therefore these persons who held the stock were not the real owners of this stock. I know that Molasky held stock and Kruse held stock and that these people were incorrectly holding that stock; Kruse so told me. Kruse advised me that the Cecilia Company owned all the stock and therefore he wanted the stock book to reflect that ownership. This conversation may have been in the Summer of 1934. The substance of that conversation was that Kruse told me that the people who held the

certificates in the old book were not the real owners, and, therefore, he wanted a new stock book to reflect the true ownership of the stock, so that a new stock book was issued, showing the stock going to the four incorporators who were the original incorporators of the company and then being transferred immediately to Cecilia as of the same date. There was a transfer from Molasky in the old original stock book who held 30 shares, to Molasky for 15 and to B. Hoffman for 15 and another transfer made of stock in the name of Clark to my name.

199 Q. Did Mr. Kruse say anything else to you at that time as to the reason for tearing up the old stock book and making up a new one?

A. Well, I suggested to Mr. Kruse in making the stock book reflect Cecelia's ownership that we should transfer the outstanding shares in the book as it was and he was of the opinion that it would raise a lot of unnecessary questions and that in view of the fact that there were no interests of third parties involved and that all of these people were all in the organization, that he didn't see why we shouldn't make a new book and reflect the ownership correctly from the beginning.

Q. Now, what kind of questions did he tell you that might arise if you transferred the original stock so that the original stock book would show it?

A. Well, that there would be questions as to whether these persons holding the certificates were the real owners of the stock and he said they were not.

Q. Have you stated the whole reason, the whole conversation between you and Mr. Kruse?

A. There was a question of these individuals holding the stock who were drawing commissions from the company.

Q. What did he tell you about that?

A. Well, he said these people were drawing commissions from the company since its inception in the percentages of twenty, twenty and thirty.

Q. Did he tell you that those percentages were based on anything?

A. Well, it was based on their understanding.

Q. Did they have any relation—did he tell you that they had any relationship to the amount of stock that they held?

A. Well, that—

Q. What.

A. They had relation to the amount of stock that was outstanding in the old book, that the stock was outstanding in those proportions.

The Court: Just a moment. What did Mr. Kruse say to you, if anything, about these sums what were paid to these parties as commissions?

200 The Witness: Well, he said that these sums were paid as commissions and that they had agreed to pay them as commissions from the beginning and that the fact that stock was issued in those proportions might tend to show that they were not commissions, and, therefore, the stock should be issued correctly to show Cecelia as the owner of all of the stock.

Mr. Hall: Q. Did he tell you that that was the reason for the destruction of the old stock book and making up the new one?

A. Well, the primary reason, as I have always—

Q. Just answer my question, will you please, Mr. Kamin?

Mr. Hall: Read the question to him.

(Question read.)

A. Well, the reason for that was, as I have stated, that if the old stock book were in existence and it showed these various transfers, that it might raise questions that these parties were actual stockholders or, rather, that these parties actually owned the stock.

Q. Now, how would that question arise, did he tell you that?

A. Well, it would arise in determining whether these payments to these persons were commissions or dividends.

Q. Yes, but who might raise that question, did he tell you?

A. Well, anybody could raise it. If you are referring to the income tax investigators.

The Court: He is asking you what was said about that, if anything?

The Witness: I don't recall anything being said about that but if—

Mr. Struett: Now, I object to any "buts."

Witness continuing: I do not recall that any stock was held by or for Mr. James M. Ragen. In the old stock book, the original 20 shares, there was a stub in the name of Mr. Ryan. I do not recall whether there was a transfer from Ryan to Ragen. In 1934 Kruse told me Ragen was holding the stock.

In the old stock book there were 20 shares issued in the name of Howard Clark, one certificate for 20 shares. A. W. Kruse said he was holding that. Molasky was holding his stock.

201 I wrote the original of GOVERNMENT EXHIBIT 200 and signed it, which is a letter dated August 27, 1934, from me to William Molasky, as follows:

Mr. William Molasky
812 S. Broadway
St. Louis, Missouri

Dear Bill:

Kindly sign the enclosed stock certificates on the Consensus Publishing Company as President, and also endorse your own certificate on the assignment on the back thereof.

Please mail these certificates back to me immediately.

Very truly yours,

HSK:BS

Herbert Kamin.

I mailed it to Molasky. The letter is dated August 27, 1934. Mr. Molasky now has the original of that letter. I saw it this summer when Mr. Molasky showed it to me. The original stock book was destroyed after that date.

In that conversation A. W. Kruse told me to draw a certificate for 100 shares to Cecelia and I did. I took a new stock book, issued the first four stock certificates to conform to the four incorporators, because under Illinois Law, an incorporator must be a stockholder, and then transferred the first four certificates over to the Cecilia Company in one certificate for 100 shares. Then I sent those five certificates to Mr. Molasky to sign them as President of the company and to endorse the certificate made out to himself for 30 shares, on the back assigning that to Cecelia, and asked Mr. Molasky to mail all the certificates back to him. Molasky did. Government Exhibit 200 is a copy of the letter I wrote.

202 I then cancelled the first four certificates, cancelled them and pasted them in the stubs in the stock book, transferred them all to the Cecilia Company by issuing a certificate for 100 shares to the Cecilia Company, which was subsequently turned over to the Cecilia Company to Hafner, who turned it over to Annenberg, who put it in the Cecilia Vaults at the First National Bank. I know this because the old certificate for 30 shares came back at the time

the new one was delivered. That certificate was handed to me by Mr. Hafner probably.

The names of the incorporators and amounts of stock subscriptions on the third page of the articles of incorporation, Government Exhibit 67, are the names and amounts to whom and for which I issued new stock in 1934. Those were the original incorporators. The new certificates must have been drawn immediately prior to the letter dated August 27, 1934, because they were drawn and then sent to Molasky for signature. The certificates were not dated August 27, 1934. The certificates were issued to the original incorporators as of the time of incorporation. A. W. Kruse told me to do that.

The certificates in the forepart of Government Exhibit 59 are those which I drew, issued in 1934. When Molasky sent them back I marked them "cancelled" in my writing. I had the forms in my desk. They were not the forms purchased originally from the Corporation Supply Company of Chicago. The names are typewritten in.

The stub, Certificate No. 5, Cecilia 100 shares, is for the stock certificate drawn by me for a hundred shares in the name of Cecilia. That likewise was dated back to 203 1929, but it was drawn at the same time, in August, 1934.

In addition to issuing new stock, I drew up minutes of meetings of stockholders and directors for the entire period from 1930 for which no minutes had been drawn and also contracts of employment. I have never been able to recall exactly when the contracts of employment were done, but it was done some time around that time. It may have been after, but it was all part of this same transaction.

In that conversation, I told Kruse that the original outstanding certificates should be called in and cancelled and in view of the fact that they were going to destroy the book, they would be cancelled by destruction and Kruse was perfectly agreeable to that. Then it turned out later that Mr. Molasky refused to return his stock certificates. Nobody returned the stock certificates at the time because Molasky refused to return his and I felt it just was not fair for Kruse or Ragen to turn theirs in. I didn't ask Mr. Ragen to turn in the stock certificate he held. I asked Kruse to turn in the certificate he held. He said "Mr. Molasky hasn't turned his in, so we all ought to turn them in together."

I asked Molasky to turn his in several times. Molasky said that he wanted to have something that would guarantee him more than just a year's employment contract. He said "If I die, my family will get nothing out of this company," and he wanted to hold on to those certificates so that he could use them as a means of getting revenue from the company in the event of his death, something tangible that he would have that showed that he would be entitled to something from the company.

204 I do not believe Molasky ever told me he actually owned that stock, in so many words.

Q. Did he ever tell you what he wanted to retain it for proof of his interest in the company?

A. Well, no, no, I would say no, I wouldn't say that he said "proof of his interest." Most of the conversations with Mr. Molasky were in the event of his death.

Q. Well, did you freely and willingly follow Mr. Kruse's instructions in destroying the old stock book and writing up the new stock book?

A. Well, I advised Mr. Kruse that I thought it was an irregular procedure for me to destroy an old book instead of making the transfers in the old book but he wanted it done that way and I didn't see anything particularly wrong in it.

Mr. Hall: I object to the last, if the court please.

The Witness: And, therefore, I followed his instructions.

The Court: That part in which he states his own personal reaction may be stricken. You have answered the question.

After I made out this certificate for 100 shares to the Cecelia Company, the new stock book and minute book was always in the company files. I did not destroy the old stock book right then. We had two stock books, the old stock book and the new stock book and they were both kept in my files. The old stock book was destroyed some time after the last transfer.

GOVERNMENT EXHIBIT 201 is a photostat of a letter the witness wrote to Molasky. The signature is mine. The date is April 9, 1935. In the letter, I sent to Molasky minutes of a special meeting of the board of directors changing the company's banking resolutions at the Mississippi Valley Trust Company in St. Louis, also enclosing a stock certificate for 20 shares made out to me.

The letter is as follows:

Mr. William Molasky,
812 South Broadway,
St. Louis, Mo.

Dr. Mr. Molasky:

205 I am enclosing herewith minutes of a special meeting of the Board of Directors of the Concensus Publishing Company changing the company's banking resolutions with the Mississippi Valley Trust Company in St. Louis. I am also enclosing a stock certificate for twenty shares made out to myself. This is to replace a previous stock certificate for twenty shares in the name of Howard Clark, which has been returned and cancelled.

Will you kindly execute the same and have the minutes signed by Miss B. Hoffman and return to me at your earliest convenience.

Sincerely,

H. S. Kamin

I enclosed a stock certificate for 20 shares to myself. There was such a certificate for 20 shares in the name of Howard Clark before I made out the certificate in my name. Kruse had possession of the certificate in the name of Howard Clark.

Kruse talked to me about the subject matter of the letter. He said Clark was sick and out of the office, and could not act as a director of the company and that this 20 shares was transferred from Clark to me so that I could act in that capacity. I endorsed it and turned it over to Kruse, presumably immediately. Kruse asked me to change it from Clark to my name. There was no question but that I did not own the 20 shares.

Presumably that certificate was sent down to Molasky who signed and returned it to me.

The original stock book was destroyed after April 9, 1935. It remained in existence for almost a year after the new one was made up.

The certificate drawn by me in my name for 20, endorsed and turned over to Mr. Kruse was taken from the same stock book from which came the certificate for 20 shares in the name of Howard Clark, which I cancelled.

There may have been and there may not have been written employment agreements in existence when I wrote

Government Exhibit 201, dated April 9, 1935. I don't recall when they were drawn up. For some time after I wrote that letter the situation continued on the basis of stock 206 outstanding held by Ragen, Kruse, Molasky.

The commission arrangement was again called to my attention. They made employment contracts from year to year. A. W. Kruse talked to me about drawing written employment agreements at about the time the new stock was made. It may have been sometime thereafter. It may have been before or after the letter, but the point is that the thing was done and employment contracts were drawn up for several years from the year 1930. They were drawn up because Kruse told me that these people had contracts with the company in which they were paid commissions and that the contracts were oral. He said that those contracts being oral, would be hard to prove and therefore he thought they should have written contracts covering the entire period. So at his direction I drew up those written contracts. Several were drawn up at one time from the year 1930 to 1934 or 1935 in the event they were made in 1934 or 1935, or even 1936 if they were made then. They were predated back to the years including 1929. They were done all at one time by me under Kruse's directions or instructions because Kruse was my boss and I just followed his general instructions about anything. The contracts were drawn in names and amounts identical with the percentage payments charged as commissions on the books of the Company.

Government's Exhibits 75, 76 and 77, being the contracts for the year 1930; 78, 79 and 81, being the contracts for the year 1931, and 80 purporting to be an assignment of the interest of J. M. Ragen in contract marked exhibit 79, dated January 2, 1931; Government's Exhibits 82, 84 and 85, being the contracts for the year 1932, 83 purporting to 207 be an assignment by A. W. Kruse to his son, Lester

Kruse, of his interest in contract marked exhibit 82; Government's Exhibits 86, 87 and 88, being the contracts for the year 1933; Government's Exhibits 89, 90 and 91, being the contracts for the year 1934; Government's Exhibits 92, 93 and 94, being the contracts for the year 1935; Government's Exhibits 95, 96 and 97, being the contracts for the year 1936; Government's Exhibits 98, 99 and 100, being the contracts for the year 1937; Government's Exhibits 101, 103 and 105, being contracts for the year 1938, and Government's Exhibits 102 and 104 purporting to be

guarantees by the Cecelia Company of the contracts marked Government's Exhibits 101 and 103, and Government's Exhibit 106 purporting to be a guarantee by the Cecelia Company of the contract marked Exhibit 105 were offered and received in evidence.

Government's Exhibit 82 and 83 are as follows:

208

GOVERNMENT'S EXHIBIT 83.**Assignment.**

Know All Men By These Presents:

That in consideration of One Dollar (\$1.00), lawful money of the United States, in hand paid, receipt whereof is hereby acknowledged, the undersigned does hereby assign, transfer and set over all of its right, title and interest to a certain Employment Contract between the undersigned and the Consensus Publishing Company, an Illinois Corporation, dated January 2, 1932, to Lester A. Kruse.

In Witness Whereof, the undersigned has hereby set his hand and seal on this 5th day of August, A. D. 1932.

A. W. Kruse (Seal)

A. W. Kruse

This Assignment is hereby accepted on behalf of the Consensus Publishing Company.

Consensus Publishing Company

By William Molasky

President

209

GOVERNMENT'S EXHIBIT 82.**Employment Contract.**

This Agreement entered into on this 2nd day of January, A. D. 1932, by and between Consensus Publishing Company, an Illinois Corporation, having its principal place of business at 441 Plymouth Court, Chicago, Illinois, hereinafter referred to as the "Company", and A. W. Kruse, of the City of Chicago, Illinois, hereinafter referred to as the "Employee".

Witnesseth:

Whereas the Company is engaged in the business of printing and publishing various kinds of information in regard to horse-racing, which materials are distributed and sold in various cities throughout the United States; and

Whereas the Employee possesses unique and original ability in the said line of business, and it is to the mutual advantage of both parties that the Company secure the services of the said Employee.

Now, Therefore, in consideration of the sum of One Dollar (\$1.00) paid by each of the parties hereto to the other, receipt whereof is hereby acknowledged, and the mutual covenants hereinafter contained, it is hereby agreed as follows:

1. The Company hereby employs the Employee to render his services in an executive capacity for the calendar year 1932, and agrees to pay the Employee for the services so rendered a sum equal to twenty per cent (20%) of the net profits of the Company, based upon weekly Profit and Loss Statements, and payable at the end of each and every week during the term of this Contract.

2. The Employee hereby accepts the said employment at the salary hereinabove stated, and further agrees to devote his best efforts on behalf of the Company, and that he will not render any services whatsoever to any other company in the same line of business.

In Witness Whereof, the said parties have hereunto set their hands and seals on the day and year first above written.

Consensus Publishing Company

By William Molasky

President

Attest:

Howard Clark

Secretary

A. W. Kruse (Seal)

A. W. Kruse (Seal)

210 I drew minutes for the company when I drew these contracts. I do not recall destroying any minutes of the Company. Government Exhibit 59's cover is that of the minute book for the company that I took it over in 1933. All of the minutes from January 2, 1930 up to 1934 were

drawn up by me at one time, the same time the certificates were drawn in the new stock book to reflect that ownership. That was done under A. W. Kruse's direction. The meeting dated January 2, 1930 was written in 1934 and dated back to that date. The meeting didn't exist before I draw the stock certificates. The same way with the other minutes.

I sent the minutes to Clark Taylor, Ryan and Molasky. The minutes might have been sent to the persons who signed or they might have been in my office to sign them. Howard Clark was not present in Chicago, he was sick. He had been a bookkeeper. He had tuberculosis. At the time the minutes were signed, Clark must have been either at Mr. Annenberg's ranch in Wyoming or at home in Ottumwa, Iowa. I sent the whole bunch of minutes that required his signature at one time. The employment contracts would be sent too.

The proxies that appear in the minute book dated September 18, 1930 are signed by me and by Mr. Kruse.

I was not with the Annenberg Company in 1930. All of them were drawn and pre-dated. The same way with the proxies dated September 18, 1931. I was not working for Kruse then. It bears Kruse's signature.

The same way for the rest of the proxies in 1932. I was not working for Mr. Kruse then. It bears my signature then and that of Kruse's son.

211 Mr. Taylor did not endorse the certificate in the new stock book for 30 shares.

The employment contracts were drawn some time after the stock was made. After I drew the employment contracts and dated them back to 1930, then he commenced to draw the contracts each year. All the time I was drawing those contracts following the time I drew the first one and dated that back, the original stock outstanding was being held by Ragen, Kruse and Molasky.

The original stock from the original stock book remained outstanding until 1938. In 1938, a ten year contract was made with Mr. Molasky, Arnold Kruse and Ragen, Jr., all guaranteed by the Cecelia Company. At that time the outstanding certificates were returned. Molasky brought them back to Chicago and turned them over to me in A. W. Kruse's office. It was torn up and thrown down the toilet. I was there with Kruse and with Molasky. Kruse tore his up and threw it in the waste basket. This was not done at the same time. Kruse's was torn up first in his office in my presence. Nobody else was present.

Kruse tore it up and threw it in the waste basket. Kruse had the ten year contract already. That was the stock that was either in Kruse's or my name.

Mr. Molasky's certificate might have been torn up first. That was done in Mr. Kruse's office in the presence of Mr. Molasky, Mr. Kruse and myself. Then I threw it down the toilet.

One day in 1938, Kruse told me to go over to Mr. Ragen's office and pick up a certificate for 20 shares. I walked over to Mr. Ragen's office. There were several people around.

I believe Mr. Kruse called him. I didn't make the appointment. Mr. Kruse said to go over there. Mr.

Ragen, Jr. handed me the certificate. I told Ragen, Jr. I was to pick it up to destroy it. We walked into another room, burned it and threw it into the washbowl. I do not know in whose name the certificate was issued. I asked Ragen, Jr. if he had the certificate, and said we are supposed to destroy this. Ragen, Jr. handed me the Consensus certificate. Ragen, Jr. said: "I want to make sure it is destroyed." I don't recall if Mr. Ragen, Sr. was present. He may have been present and he may not. I walked in there because there were a lot of people there, but junior and I were alone at the time we destroyed it. Counsel for defendants admit the signatures on the employment contracts are genuine.

Mr. Molasky managed the operations of the Consensus Publishing Company, but not entirely. A. W. Kruse and Ragen, Sr. did also. They were consulted frequently by Molasky as to policies, Kruse in my presence on many occasions; not Ragen in my presence because I wasn't in Ragen's office. I don't know much about the operation of the companies' business.

Government Exhibits 108 and 107 are true photostatic copies of the certificates that Molasky gave me in 1938 that were destroyed.

GOVERNMENT EXHIBITS 200 AND 201 were offered and admitted in evidence.

On Cross-Examination by Mr. Struett.

I have been an attorney since 1928. My wife is a relative of Mr. Annenberg. I went to work for the Annenberg companies in the Spring or Summer 1931, and went to the other office in 1933 for Annenberg's corporations.

Part of my duties was to straighten up these various

corporations and these old stock records and their minute records. In that connection where there were minutes missing, I was to prepare them, and where stock was outstanding in the names of particular peoples or dummies I was trying to get the entire matter into the hands of the Cecelia Company. Cecelia was the big Annenberg Company and it was my duty to see that all of these little corporations whatever they were had their minutes prepared and brought up to date, and where stock was in the names of dummies arrangements were made so that the stock would reach Cecelia. That substantially was my job when I was in there in 1933. I told that to Mr. Hall, Assistant United States Attorney, on many occasions, about a half dozen times.

When I got there, the Consensus Corporate Record was no different from other corporate records in so far as the minutes were completed. The only corporate minutes prepared or executed were pages 1 to 31, inclusive. In Government Exhibit 59, there were no other corporate minutes of any kind or character. I did not destroy any corporate minutes of this corporation.

When I took over this Consensus Publishing Company, these stock certificates were not there, but placed in there long afterwards by me at least one or two years later. All the minutes in Exhibit 59 from January, 1930 were prepared by me and placed in the book. None of them were in there when I first started to straighten out this company. If the stock certificates and minutes from January, 1930 are taken out, the minute book is the minute book as ordered with the sheets which come in the purchase of an original minute book.

214 There was a separate black stock certificate book.

Howard Clark, Molasky, Ryan and Taylor were the four incorporators. Stock certificates in the old book were issued to them.

I have seen Government Exhibits CB1 and CB2, J1 and GL1. I never worked on them or did anything in connection with them.

Prior to the time I went to work on the Consensus Publishing Company, I had straightened out or worked on other corporations. Where I procured stock certificates in the names of dummies and had written up minutes. Objection to the last was sustained as repetitious. There was an old stock book.

Counsel for defendants asked: There isn't any question

but what your purpose was to have the Cecelia Company own the Consensus Publishing Company when you went to work on this Consensus Publishing Company picture.

Objected to as incompetent, immaterial and irrelevant. There has been no testimony of that kind from this witness.

The court sustained the objection thus: I think we have got his purpose that he gained from conversation and acts.

I worked for the Annenberg Companies, not Mr. Annenberg. I worked for them including Mr. Annenberg, Mr. Annenberg owned them. The purpose of those stock certificates and my work in connection with the Consensus Publishing Company was to show ownership of all of the stock in Cecelia Company. I found that the stock of the Consensus Publishing Company had been issued in the names of various dummies, that Mr. Kruse had possession of one of those certificates, Mr. Molasky of one, and 215 Mr. Ragen of one. I was to get those stock certificates.

Counsel for defendants asked: "Had not in fact prior thereto Cecelia been the owner of all of it."

The United States Attorney objected and the court sustained the objection thus: That is repetition.

I later discussed with Mr. Kruse the original formation of the Consensus Publishing Company at the time the new stock certificates were made out. Kruse has always told me that it was the intention of the parties that Cecelia should own all the stock of the Consensus Publishing Company. He told me that the Cecelia Company owned the Consensus Publishing Company, that Kruse, Ragen and Molasky were working for the Consensus Publishing Company and received a percentage of the profits as commissions. I did not verify that in any way. Kruse also said they were to get a certain percentage of the profits for their services in connection with the Consensus Publishing Company. In connection therewith I prepared these various documents which have been identified in evidence or offered in evidence.

I didn't work for A. W. Kruse. I worked under Kruse. He was my superior in the companies. All the minutes were prepared by me. They were not prepared under the direction of Kruse, he didn't draw them or prepare them, they were prepared pursuant to the conversation with him after Kruse advised me what all the facts were.

A. W. Kruse didn't sit down with me when I wrote them. Kruse told me that Kruse, Ragen and Molasky had an agreement to get percentages of the profits when

this company was formed. I prepared the minutes of the Directors of January 2, 1930, but I don't recall any further conversation about them with Kruse. Probably there wasn't any.

Kruse had told me they had an agreement to get 20, 20 and 30. These minutes were prepared for the purpose of ratifying the written agreements that were made up. I did the actual preparation of these minutes.

My purpose in destroying the first stock certificate book was because in my opinion it had no further validity. The new stock having been issued, the Cecelia Company would have it and it should be destroyed. I discussed it after with Mr. Kruse. I did not have in mind or discuss with Mr. Kruse in connection with the destruction of that stock book any concealment of any matter relating to income tax of the United States, or discuss any questions which might have a bearing on the violation of the income tax.

The employment contracts were prepared, written and dictated by me. I always knew of my own knowledge that Molasky, Kruse and Ragen were connected with the Company and did work for the Company. I got up the minutes and O.K.'d them because of what A. W. Kruse told me.

I had a lot of difficulty to get the stock certificate from Molasky. I had a lot of work with the various corporations. My mind was taken up at times with other things over there. Finally I couldn't get the stock certificate until I prepared the ten-year contracts. As a lawyer I didn't intend to do anything to violate the income tax laws. I told Mr. Hall I did these things under the circumstances and he dismissed me out of the case.

I represented the Cecelia Company, M. Annenberg and his family owned the stock in that company; there was no outsider in there at all. There are very few cases where Annenberg owned stock in a corporation, where there were any strangers who had stock in those corporations. I believe that in the General News Bureau, Cecelia Company owned one-half the stock, but Cecelia finally acquired all of it. Annenberg didn't organize the General News; he bought into the corporation after others had been operating it.

There may have been some corporation of there own little affiliates that someone else owned stock in beside Annenberg

and his family. I don't recall any. There may have been though. I heard A. W. Kruse say on many occasions that M. L. Annenberg didn't have or wouldn't have any partners. Kruse told me that in a conversation about the Consensus Publishing Company. Kruse on many occasions told the witness that the Consensus Publishing Company was owned by Cecelia. Kruse said to me on many occasions in reference to the Consensus Publishing Company that M. L. Annenberg never had any partners and never would. He made that statement to me on many occasions. I don't know whether in connection with Consensus Publishing Company.

218 When I went there in the summer of 1933, there were about 75 corporate minute books or stock books to look after. All these were corporations in which Cecelia Company and not Annenberg was the owner. It was my duty to look after the interests of the Cecelia Company, as well as all the other corporations in which Annenberg had an interest. My job was to see that the records of all those corporations were in order. They had previously been in New York. They had been neglected there for several years prior to carrying to Chicago. That was the reason I was put over those particular corporations.

I was in the general practice of law for a year and a half as a young lawyer prior to working for Mr. Annenberg. I had no corporate law experience except my schooling. I did know, though, the general fundamentals of corporate activities. In a general way I am familiar with the different kinds of contracts and resolutions by Boards of Directors, what contracts should be ratified by Boards of Directors.

Counsel for defendant asked: Would you say a contract that gives away seventy per cent of the net income of a corporation would be such a contract as would require action by a Board of Directors.

The United States Attorney objected to this question as incompetent, irrelevant and immaterial and asking for the opinion and conclusion of the witness.

The court sustained the objection thus: After all it is a question of law here. The question of what he
219 did in pursuance of his directions, whether he did it as a lawyer, if he afterwards thought it was necessary, I am not going to go into that.

I saw the stock books of Consensus Publishing Com-

pany when I came there. I did not get around to working on the Consensus Publishing Company's records until probably the time the new stock book was made up. I saw the old stock book and the stubs there corresponding to the certificate of incorporation as to the shareholders. I never saw any of those certificates that were outstanding. I saw the certificate of which the stub indicated that it was issued to Thomas Ryan when it was turned over to me in 1938 by Ragen, Jr. I don't know it was issued to Ryan. I never saw the face of the certificate or Ryan's name on it. I never saw a certificate of the Consensus Publishing Company with the name Ragen on it. I never saw a certificate with Ryan's name on it bearing Ryan's endorsement.

There is a certificate in the minute book with Ryan's name on it, similar to what was issued from the old book. The present certificate doesn't bear an endorsement. I never saw the old one. I never saw a certificate issued in the name of James M. Ragen or his son.

When I told Mr. Hall, Assistant United States Attorney, that Ragen held a certificate of Ryan I didn't know whether he did or not. The only information I had about the ownership of stock in either Ragen or Ryan was what was told to me.

220 Counsel for James M. Ragen and James M. Ragen, Sr. moved to strike all the testimony of the witness with reference to stock certificates in the name of Ryan, James M. Ragen, Sr., or James M. Ragen, Jr., on the ground he has no personal knowledge of it and the only information he had is what somebody told him.

The court ruled that it might stand subject to the motion.

Ragen signed contracts as a director. I don't know how many without consulting the books.

There is no meeting or minutes where Ragen, senior or junior, or Ryan, attended as stockholder. The book is the original minute book. It was never destroyed. The minute book was never doctored, altered, or changed in any particular from the condition it was in when I first saw it, except by the addition of the minutes I have described. No alteration or change of any kind has been made in that book or the contents from the time I first saw it. The question of the destruction of the minute book was never discussed by anybody, Kruse, me, or anybody else. I never told the United States Attorney that

they were destroyed. I testified before the grand jury which indicted me but was asked no questions about the Consensus Publishing Company. They knew I was a lawyer. I was dismissed out of this case. I assume because I was innocent. My attorney told me that. The United States Attorney indicated that by dismissing me.

The United States Attorney did not tell me I would be dismissed if I told the truth in this case. Nobody else told me that. My lawyers told me to come over, make a full disclosure and tell the truth. I did that.
221 I assume that when the United States Attorney heard that he dismissed me. I did not say anything on the stand different from what I told the United States Attorney in his office.

Molasky wrote Consensus Publishing Company a letter advising them to divide his commission, half to him and half to B. Hoffman. I don't recall when it was written. I saw it in the company's files when I first got there in 1933 or '4. I saw it last when the company's records were subpoenaed and turned over to the grand jury. I haven't seen them since. Ragen, Jr. was subpoenaed to produce all records of the company. Pursuant to the subpoenas they turned over the contracts, the minute books, stock certificates and everything they had. That was early in 1939. Those have been in the government's possession since and never returned. All books of account, all correspondence, every file of the Consensus Publishing Company have been delivered to the government.

I have discussed the case with the Assistant United States Attorney, Mr. Hall. He wanted me to sign a written statement. I read over the statement and it didn't reflect the facts as I gave them so I asked Mr. Hall that I be taken before the grand jury and be questioned so I could give the facts in my own language. I was sworn and gave my testimony under oath.

Walter Annenberg, M. L. Annenberg's son was vice president of the Cecelia Company. I saw him around there quite often. He was not particularly active in the management of this whole business. He appeared there from time to time. He lived in New York. He came
222 to Chicago on trips; may be half a dozen of them in a year. I had no occasion to discuss the Consensus Publishing Company's problems with him, this stock issue, or anything of that sort with him.

I saw Ragen around the office from time to time, not particularly often. I saw Ragen, Jr. too.

In the office I was in there was a bookkeeper, the office for the Cecelia Company, the accounting department for the Cecelia Company and its subsidiaries.

Men were engaged to work out of other offices and meet customers and were doing business but I had no occasion to go to there except for some particular purpose. The employes of the Racing Form didn't come to my office. I wouldn't know what the employees of the Consensus Publishing Company were doing down in St. Louis, or in Chicago. I don't recall that I witnessed any work being done by either of the Ragens for the Consensus Publishing Company in the operation of its business. I know that both Ragen, Junior, and Senior, were executives in the Consensus Publishing Company and would always be consulted as to the company's policies. I know Molasky consulted with them. I was present at many telephone conversations between Molasky and Ragen, Sr., and Ragen, Jr. Mr. Molasky used to come up from St. Louis often in Kruse's office and would call up Ragen and say he wanted to discuss this or that and then he would make an appointment and go over to Ragen's office.

223 At the time of the first conversation with me A. W.

Kruse told me in referring to the stock of the Consensus Publishing Company that a meeting was held at the office at which M. L. Annenberg, William Molasky, Ragen, Sr. and A. W. Kruse were present, at which there was an agreement that the Cecelia Company was to own the entire stock of the Consensus Publishing Company. Kruse also told me that at that time there was an agreement made orally that Mr. Molasky was to get 30% of the profits, James M. Ragen, Sr. 20%, A. W. Kruse 20%, as commissions for services rendered and to be rendered. Kruse said the reason Cecelia Company took over that business was because Molasky was losing money and Ragen as head of General News Service and Kruse as head of the Racing Form could get business from their customers. Ragen was head of the General News and I know that as a fact. I know Kruse was head of the Racing Form.

The Racing Form is sold in the racing business. It is used by the public who make bets through bookmakers. The bets were taken through the News Service which

was owned by Annenberg who was giving service to the bookmakers.

I knew then that run down sheets had a code number so they couldn't get news about horses unless they had these run down sheets. The General News delivered them. So that when information came back, like Man of War,

Number 9 was the cryptic number shown on the run 224 down sheet. If you bought your run down sheet from anybody else you wouldn't have the number and it wouldn't do you any good. You couldn't get the news.

When I said A. W. Kruse was my superior I don't believe I would have done anything unlawful because Kruse asked me to, if Kruse did. Kruse could tell me regarding certain duties, but he couldn't tell me as a lawyer regarding the law, and I wouldn't take those orders. If I believed it was illegal, I wouldn't take orders from Kruse or anybody else.

I believe we discussed the income tax to the extent that I had been advised that Kruse had been advised by Kirkland's office that where the stockholders of the company had received a division of the profits in proportion to the stockholdings before the Board of Tax Appeals they were to be dividends instead of commissions.

There was some discussion in 1934 about that case. Kruse then told me that he wanted what actually occurred reflected in a proper and legal manner. It is my view that a contract for more than a year would not be legal unless it was in writing in Illinois. Kruse told me he had the contracts for commissions for a large amount of money and they wouldn't have a right whatever against this corporation. That is one of the reasons Kruse and I decided to write the contracts for 10 years. For fear the company wasn't good for it they got Cecelia to guarantee it, and

Melasky sent his stock in. After that I wrote the con- 225 tracts annually until the first of 1938. I wrote 2 or 3 of them every year as well as minutes of the corporation which included the resolutions authorizing the execution of the contracts.

Kruse never said to me that these fellows didn't work, that they are not doing anything, that we were just paying them. I never heard anywhere that nobody was going to work, that they were just going to take the profits and deduct them from the income and gyp the government. No

one ever told me that. There was nothing to make me suspicious that the corporation was trying to gyp the government out of money. Objection to the last statement by the government was sustained.

226 *On Cross-Examination by Mr. Baron.*

Molasky knew I was an attorney. If Molasky asked me whether it was legal for Molasky to sign the minutes and the employment contracts when they were tendered to him for signature. I would have said that I was an attorney at law and wouldn't ask him to do anything but what was legal. I don't right now recall that particular conversation. I had many conversations with Molasky. I don't exactly recall those words.

On Cross-Examination by Mr. McInerney.

I was present when Ragen, Jr., signed the minutes. I was in the habit of bringing the minutes over there, and sticking them on Ragen's desk for him to sign his name. Ragen, Jr., never read them. Ragen, Jr., was running the News Service, as long as I was around there.

On Redirect Examination by Mr. Hall.

I was not advised of my dismissal from the indictments referred to on cross examination before I talked to Mr. Hall in his office about this case. I talked to Mr. Hall prior to the hearing on Mr. Annenberg's plea of guilty. Mr. Hall never said anything to me about my guilt or lack of guilt.

I talked to Mr. McInerney, counsel for the defendants, Saturday, but to none of the others and told him I would be called as a witness for the government and told whatever I knew about the case.

The Cecelia Company owned stock in the R. D. Publishing Company of Buffalo, a run down sheet company in the same kind of business as Consensus. I think Arnold W. Kruse and James M. Ragen also owned stock in it.

I think the Cecelia Company or M. L. Annenberg did own stock in the Molasky Holding Company. I don't know if Arnold W. Kruse or Mr. Ragen owned stock there.

On direct examination I didn't mention that Kruse and I discussed this particular Board of Tax Appeals case concerning the income tax question whether it was dividends or commissions. We discussed the fact that where commissions were paid to stockholders in proportion to their stockholdings the Board of Tax Appeals would disallow the usual deductions.

I don't know whether these persons were stockholders. On cross examination, I testified that I never knew that James M. Ragen held any stock. That is my best recollection now.

The United States Attorney asked the following question:

Q. You say now that you never—you testified on cross examination that you never knew James M. Ragen held any stock?

A. James M. Ragen?

Q. Yes.

A. That is correct.

Q. You testified to that on cross examination, did you?

A. Yes, sir.

228 Mr. McInerney: He testified to it in direct examination.

Mr. Hall: Q. Is that your best recollection now?

A. Yes, sir.

Q. Now refreshing your recollection, was not this question asked of you and did you not make this answer before the grand jury:

Mr. McInerney: Now, if the Court please, I am going to suggest that this practice was before the Supreme Court of the United States on the Standard Oil case and the Court suggested that the Court should be very careful in letting proceedings had before a grand jury be presented, but if it is limited for the purpose of refreshing the witness' recollection and we are entitled to see it.

The Court: I know what the Supreme Court said about it. He may testify whether he had at some other time or some other place had a particular question put to him and gave a certain answer.

Mr. McInerney: Very good. If this is for the purpose of impeachment then we are entitled to know what the grand jury minutes are under that case if it is for the purpose of refreshing his recollection in that situation, I think your Honor should look at it and see, before he testifies.

The Court: Overruled. He may ask the question.

Mr. McInerney: One more objection that the testimony was not given simultaneously with the occurrence?

The Court: Overruled.

229 Mr. Hall: I will ask you if these questions were not asked of you and if you did not make these answers:

"Q. Did Thomas Ryan own twenty shares in his name or did he hold that for somebody else?

"A. He held that for somebody else.

"Q. James M. Ragen?

"A. Yes, sir."

Mr. McInerney: Sure, you told him to answer, the old stuff, your Honor.

The Court: Overruled.

The witness stated that he still says he has no actual knowledge whether James M. Ragen was the owner of any stock; that he probably did answer that question; that he assumes so.

I knew that Arnold W. Kruse held some stock in that company, too, I have seen that certificate.

The U. S. Attorney then asked: What is your testimony now as to whether this question that James M. Ragen held his stock of the Consensus Publishing Company?

The Witness answered: "Well, I knew he turned stock over to me in 1938. I assume he held it prior to that time. I have no actual knowledge of it."

I don't know if James M. Ragen ever attended any stockholders' meeting. I was not there at all.

I don't recollect whether there were or were not minutes in the minute book before I drew the stock certificates.

230 Mr. Hall: Q. Now you testified on cross-examination that it was your purpose to get all the stock outstanding in the Annenberg Company — the name of Cecelia, that is what you testified to on cross-examination?

A. That was part of my job to see that the stock books and minute books reflect the actual situation.

Q. And did you have the same kind of instructions in connection with other companies as you had in connection with drawing new certificates of the Consensus Publishing Company?

A. Well—

Q. To draw new certificates and date them back?

A. I did draw new certificates and date them back in other companies.

Q. And tear up the others?

A. I may have of some of the other companies.

Q. Were they charged to payment as commissions?

A. Well, I don't know about that.

Q. What about it, tell us?

A. I know I have pre-dated minutes on maybe fifty corporations.

I know Cecelia had guaranteed the ten year contracts in 1938. I prepared the guarantees. A. W. Kruse told me to prepare them. I presume Kruse had the power to discharge me. .

On Recross Examination by Mr. Struett.

I discussed the Board of Tax Appeals case with Mr. Kruse. It was not a question of being wrong to take commissions under that case in the same amount as stock outstanding. It was a case that disallowed them as deductions. It wasn't illegal. Counsel for defendants asked: What did you talk to him about. The Court sustained an objection thereto.

The Board of Tax Appeals ruled where commissions were paid to stockholders respecting certain percentages of their stock holdings it was not a deductible expense from the income or profits of the corporation.

I knew the old stock certificates were outstanding—March 16, 1933, and March 17, 1936. I signed Government Exhibit 11, the Consensus income tax return for 1935 with deductions for commissions of \$76,713.76, and the income tax return for 1936. I did nothing wrong in signing them. I signed them taking commissions as a deductible item. I knew it was given Mr. Ragen, Mr. Kruse and Mr. Molasky.

Q. You knew they were stockholders in the same proportion?

A. They were not stockholders. Cecelia owned all the stock.

The stock was outstanding but I thought it was all right. I learned quite a bit about the Consensus Publishing Company since I first started there.

Recross Examination by Mr. McInerney.

I believe the Board of Tax Appeals opinion I heard about there was a case where the commissions were given a man that owned all the stock of the company. The wit-

ness' opinion in this case was predicated on the situation here where Cecelia owned all the stock and the others got commissions.

I am still attorney for the Consensus Publishing Company. I am not an officer of it. The Certificate for a hundred shares issued to Cecelia is in the possession of the Consensus Company, or it is really in my possession in the vault contents in a box containing stock certificates owned by Cecelia.

232 The witness was asked by counsel for defendants "Do you know if Consensus is now engaged in the business it has heretofore been engaged in. It was objected to as immaterial and the objection sustained.

The initials on the various stock certificates in Government Exhibit 59 beneath the signatures of Howard Clark and William Molasky up to certificate No. 4 are mine. They indicate as to who is to sign and where. That was a part of the work I did pursuant to instructions by Mr. Kruse.

Counsel for defendants asked: Did the Consensus Company cease operation of its business on August 31, 1940. Objection thereto was sustained.

233 PATRICK A. ROHAN, called as a witness for the Government, testified as follows:

On Direct Examination by Mr. Hall.

I am deputy collector of Internal Revenue in St. Louis, First Collection District of Missouri. The witness identified Government Exhibits 47 to 53, inclusive, as income tax returns of William Molasky with respect to the years 1930 to 1936—Government's Exhibits 55 to 58, both inclusive, being income tax returns of B. Hoffman for the years 1933 to 1936, inclusive, also Government's Exhibit 54—the income tax return of William Molasky for the year 1937. The returns were filed by them in my collection district.

Cross-Examination by Mr. Struett.

There was further investigation on Government Exhibit 57 and additional taxes were found due of \$458.78 for B. Hoffman for 1934. That was paid.

234 KATHERINE KEELER, called as a witness by the Government, after having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hall.

My name is Katherine Keeler. I live at 1507 North Dearborn Street, Chicago. I am an examiner of questioned documents, sometimes known as a handwriting and typewriting expert. This work takes all of my time. I have been engaged in this profession for approximately ten years. I have an office and laboratory where I engage in my profession at 231 South LaSalle Street, Chicago. My office and equipment consist of a general office, examining room equipped with microscopes, special lenses and other equipment to facilitate examination and a photographic laboratory equipped with various cameras and a dark room. I have been engaged in my work in my laboratory at 231 South LaSalle Street for a little more than two years. I have assistants in my employ. Prior to July, 1938, I was an examiner of questioned documents in the Scientific Crime Detection Laboratory at Northwestern University School at 22 East Superior Street, Chicago. I was associated with that laboratory as an examiner of questioned documents for seven years and for more than one year of the latter part of that time I was the assistant to the former examiner of questioned documents.

Mr. Struett: Your Honor, please, there is no use of going through any more of this lady's qualifications.

The Court: Do you waive the qualifications?

235 Mr. Struett: Why, certainly.

Mr. McInerney: We will admit that she will qualify if he keeps asking her.

Mr. Struett: Certainly.

Whereupon the witness continued.

I have examined the typewriting on Government's Exhibits 75 to 85, inclusive, which you hand me, dated in 1930, 1931, and 1932, and on the basis of my examination I have formed an opinion that all of them were typed on the same machine.

Q. Did you make an examination with respect to that?

Mr. McInerney: We admit that, Judge.

Mr. Struett: We admit that.

Whereupon the witness continued.

I made an examination to determine whether the condition of the machine which typed Government's Exhibits 82, 83, 84, and 85 bearing dates in 1932 was similar to its condition when it typed Government's Exhibits 75 to 81, inclusive, bearing dates in 1930 and 1931, and in my opinion the condition of the machine at the time it types Government's Exhibits 82, 83, 84, and 85 was the same as when it typed the other exhibits referred to, namely, Government's Exhibits 75, 76, 77, 78, 79, 80 and 81 dated in 1930 and 1931.

Mr. Struett: If your Honor please, we will stipulate that it was done the same time.

Mr. Hall: I don't want that. I want to examine this witness.

Whereupon the witness continued.

That opinion is based on the condition of the ribbon as revealed by the type as the same. A similar color. A similar degree of inking. The condition of the type face itself was similar; in other words, the defects were the same, showing no increased intervening wear between the 236 typing of the various documents. The condition of the type face itself not only as to the degree of defectiveness, but as to the degree of dirtiness. The degree of dirtiness is similar, too, throughout the typing of the documents.

I have examined Government's Exhibits 86 to 97, inclusive, which you hand me, being certain employment contracts dated from 1933 to 1936, inclusive, and the type-writing thereon to determine whether these exhibits were typed on the same machine, and as a result of that examination I have formed the opinion that all of these documents were typed on the same machine. I have examined Government's Exhibits 95, 96, and 97, dated in 1936, for the purpose of determining whether the condition of the machine when it typed those exhibits was the same as when it typed Government's Exhibits 86 to 94, inclusive, dated from 1933 to 1935, inclusive, and I have formed the opinion that the machine was in the same condition when it typed all of the documents referred to, namely, Government's Exhibits 86 to 97, inclusive. My reason for that opinion is that I found combined in the typing of each one of these documents a similar condition of ribbon and a similar condition of the type face as to defects and a similar condition as to the relative clogging of the type.

In my experience I have found that a machine in ordinary office use will show a variety of conditions over a period of a year. Certain features will vary in the type-writing of a machine that is being used over a period of several years. The condition of the ribbon, each ribbon that is used varies as to the degree of inkiness from 237 the time it is put on until it wears out and the taking off of ribbons themselves may vary the type. In other words, one ribbon may be used on a machine at one time and the type exactly duplicated in color of ink or braid, but when it is renewed with a fresh ribbon the clogging of the type face may vary from time to time depending on how frequently it is cleaned or the amount of erasure or the amount of other matter that gets into the typing from time to time. With wear it clogs up and these defects gradually develop and become apparent from the typing machine itself. Certain letters may become mislined with each other in relationship of one to another and this will change with use. Sometimes the type face itself wears off so that it is incomplete and is not quite a perfect reproduction of the even type face. This may be found on the typing from one time to another.

I have examined Government's Exhibits 46 to 54, inclusive, being the income tax returns of the defendant William Molasky for the years 1929 to 1937, both inclusive, these returns bearing the signatures of William Molasky, and I have also examined the following checks bearing the signatures of the defendant William Molasky, being Government's Exhibits numbered WM 15, JMJ 128, JMJ 200, JMJ 299, JMJ 343, JMJ 351. (The latter exhibits are checks of the Consensus Publishing Company signed by William Molasky bearing dates at different times from February 27, 1930, to December 3, 1937.) I have made a study of the signatures of William Molasky appearing on these checks and on these tax returns, and I have made a study of all of the signatures on the employment contracts, Government's Exhibits 75 to 85, inclusive, and as a result 238 of that study I have formed the opinion that all of the signatures of the defendant William Molasky appearing on Government's Exhibits 75 to 85, inclusive, being the employment contracts dated in 1930, 1931 and 1932, were all written at one time. This opinion is based upon the observation of William Molasky's signatures on the various income tax returns for the years 1930 to 1937, inclusive, and upon an observation of the various signatures of Wil-

liam Molasky on Government's Exhibits WM 15, JMJ 117, JMJ 128, JMJ 200, each of which bears a different date, and I observed the fact that in these various signatures written on different dates there is presented a wide variety in ink used. This wide variety does not represent any duplication on the various dates and the variety is not represented in the signatures on Government's Exhibits 75 to 85 inclusive. On these latter exhibits, the signatures of William Molasky are all written with similar ink and with similar pen and do not represent any of the normal variety found in the other signatures mentioned in my comparison.

Mr. Struett: If your Honor please, as to these other exhibits we will admit she would testify in the same way and in the same manner as to the other men whose signatures appear thereon.

U. S. Attorney: We certainly have a right to put in our evidence the way we want to.

Whereupon the witness continued.

I have examined the signatures of the defendant William Molasky on Government's Exhibits 86 to 100, inclusive. (These exhibits are the employment contracts dated in the years 1933 to 1937, inclusive.) As a result of that examination it is my opinion that the signatures of William 239 Molasky appearing on Government's Exhibits 86 to 97, both inclusive, (being employment contracts dated in the years 1933 to 1936, inclusive) were written at one time. I will explain the answer I just gave by taking the various documents used in my examination and show them to the jurors, pointing out the conclusions which I drew, pointing out the various exhibits in chronological order, WM 15 of 1930, JMJ 128 of 1933, JMJ 117 of 1933, JMJ 200 of 1934, and pointing out the income tax returns in chronological order so that the signatures of William Molasky may be seen for the years 1929 to 1937, inclusive.

Mr. McInerney: Are you going to offer the tax returns in evidence. I want them in.

Mr. Hall: For all purposes we offer them right now.

Mr. McInerney: Very good. If you are going to offer them, all right.

The Court: They may be admitted.

(Whereupon the documents marked GOVERNMENT'S EXHIBITS 46 to 54, both inclusive, were offered and received in evidence.)

Whereupon the witness continued.

Indicating the various William Molasky signatures and

pointing out the various colors of inks and the various types of pen with which the penholder made these signatures on different days, I find that there are no two colors of ink exactly similar.

I now point out in chronological order the signatures of William Molasky shown on Government's Exhibits 86, 87 and 88 of 1933; 89, 90 and 91 of 1934; 92, 93 and 94 of 1935;

95, 96 and 97 of 1936 (these exhibits are the alleged 240 employment contracts dated in the year designated above), and I point out that in those signatures the same color of ink appears with variations only in the density in the color at certain places where the ink is heavy as compared to other points in the same writing or different writings where the ink is less dense.

Mr. Hall: I now hand you Government's Exhibits marked for identification.

Mr. Struett: We are perfectly willing to admit that this lady will testify relative to any examination of a document, that is, she will say that document was executed by certain people at a certain time, admitting her qualifications and admitting the basis of her reasoning, and admitting that she is an expert here, obviously, so why go through the whole thing a dozen times?

Mr. McInerney: I am willing to admit that this lady, if asked with reference to any other signatures or contracts, employment contracts, would make the same answer she has made with reference to Molasky, that I will admit. Whatever she may be asked about any other signatures on the employment contract with any reference to any of these defendants who signed at the same time that she would make the same answer that she made with reference to Molasky's signature.

Defense counsel do not admit that these employment agreements 1930 to 1936 inclusive were signed and executed at one time.

Mr. Hall: Then I will put a shorter question.

Whereupon the witness continued.

It is my opinion that each person who signed these employment contracts from 1930 to 1936 inclusive, being exhibits 75 to 97 inclusive, signed his respective signatures on the contracts at one time, signed all at the same time, with the exception of what I have already said with reference to Molasky's, which were signed in two groups, 241 that is, the group of 1930, 1931 and 1932, which were typed on one machine, and the group of 1933 to 1936,

inclusive, which were all typed on another machine. But with reference to each of the other signers throughout the entire group from 1930 to 1936, it is my opinion that those documents were signed by each of the persons at one time. That is, as to Mr. Molasky's signatures, the type line differences happen to coincide with the two distinct groups. In other words, the groups involving Molasky's signature exactly coincide as to differences in typings, but this does not apply to the other signers throughout the entire group up to 1936 when they signed, and it is my opinion that each of them signed all at one time, except one signature, the signature of Lester Kruse, which I have not compared with the standards inasmuch as they were not made available so it is not accepted in my reply.

I have examined the signatures of Howard Clark on these employment contracts and my answer applies to those signatures. I did not have the standards to make a comparison for Lester Kruse.

242

Cross-Examination by Mr. McInerney.

I have been a witness many times on matters which involved questioned documents. I first testified in 1932 and I have testified frequently since then on behalf of any one who is interested and has certain features about which I have observations to present in court. If my conclusions happen to be conclusions which they would like to have furnished in court, then they call upon me and I present them. Many times conclusions are not conclusions which the client who asks for the examinations would want to present in court and on those occasions, of course, I am not sent.

I started the work I have just testified about on September 7th of this year. Mr. Riley brought the documents over to my office after an appointment had been made through Mr. Hall, and I was requested to look at these documents in addition to several others which I have mentioned in my testimony for the purpose of determining whether or not any, either or all were written at the same time, and if not, for me to give the observations I have made in the report. I looked at the documents in the presence of Mr. Riley. I think Mr. Riley was in my office about 10:00 o'clock in the morning of September 7th, Saturday morning.

Q. Can you give me approximately how many docu-

ments you examined beginning at 10:00 o'clock Saturday morning. Oh, you don't have to be accurate?

A. We will say approximately one hundred. Maybe less. The basis of my testimony is that there are a combination of circumstances which show these documents were written on the same typewriter, that is, they were written in two groups. Some were written on one typewriter and some on another. My opinion did not include anything about a stenographer. I can't say how far apart they were typed. I cannot tell you definitely whether

243 they were written on the same day or not. I will state that they were written within the same period of time, involving no change in ribbon upon the machine and involving no change of wear and tear upon the machine. If the machine were in ordinary office use, I would say that that period would not exceed one month. I don't know whether the machines were in ordinary office use or whether after these contracts were completed there was anything else written on the machines at that time or after these documents were written. I have no opinion as to the length of time the machines were not in ordinary office use. But if the machine was in ordinary office use I would say the period in which they were written would not exceed a month. I have no opinion as to whether or not it was in ordinary office use. Those answers relate to group one, as to group two my answers would be the same. Group one includes the contracts dated in 1930, 1931 and 1932. I do not know whether group one and group two were typed at the same time. As far as the typing indicates, they might have been typed a year apart. I do not know that Mr. Molasky signed the contracts in group one on one day and the contracts in group two on another day. I merely stated that within one group they were all done at one time. In other words, one after the other, with a similar pen, similar ink, all in combination and similar size and general form. As to the other group they were all done at the same time. Within one group all were done at one time. However, there are differences between the two groups, which would not necessarily indicate that they were written at one time. They are distinctly divided as to pen strokes. I can not answer your question yes or no whether in my opinion group one and group two were all signed at the same time because that would be inaccurate. I base my opinion that each of the gentlemen who signed these employment contracts signed them all at the same time be-

cause there was a lack of dissimilarity in their signatures that appears in the other instruments I examined. If Mr. Molasky had a pen on his desk which he had had for years and the same color ink, that circumstance, if I knew it to be a circumstance, would change my opinion. That is why I looked at his income tax return; to check that possibility.

Q. I am assuming it to be true for the purpose of this discussion.

A. If I knew it to be true—now, wait a minute, if we assume it to be true?

Q. Yes.

A. But I want to also know whether or not you assumed that I saw the income tax signatures or not?

Q. Yes, yes. I will put it another way.

A. I cannot assume two things.

Q. I will put it another way.

A. I cannot assume two things, it would be two contradictory assumptions. You could not assume them both at the same time.

I looked at some income tax returns signed at approximately annual periods. They may have been signed in different places, and with different pens and different inks. I don't know whether one was signed in California and another in Maine. The income tax returns were signed at least a year apart and the checks that I examined were signed at intervals depending on their dates; they all appear here. They were not all signed on the same date.

Q. Now, if Molasky or any of these individuals signed these employment contracts with the same pen and the same ink, at different dates, how could you tell them apart?

A. If the dates were actually a year apart, even if the inks came out of identically the same bottle into the same fountain pen they would show color differences because ink in one bottle over a period of as much as a year changes.

If the ink were used from different small bottles sent in by the same manufacturer to me at intervals over a period of years, that would increase the chances for there being color differences.

Q. I am talking about a man who has a fountain pen in his office that he has used for a long time, that he has for a long time.

Q. And he uses it all the time?

A. And changes it when it is necessary to change a pen point, he has the same ink, small quantities from the same

manufacturer, never stocks up with it, never has any stale ink in it, and signs all the documents with that pen, could you then tell whether these instruments were signed on the same day, on the theory of similarity alone in ink?

A. If you assume all of those things—now, this is purely hypothetical.

Q. Of course it is.

A. It has nothing to do with this particular one in question, has it?

Q. It has not?

A. No.

Q. How would you know that?

A. Because it does not fit—

The Court: Well, don't go into that.

The Witness: It does not fit into what we know what this man does.

Mr. McInerney: Q. How do you know Mr. Molasky did not do all of them?

A. Well, I would say in answering that question—

Q. Just a minute, please. How do you know Mr. Molasky did not that?

A. Because I am assuming that those are his genuine signatures on the income tax returns and if he did that that would be shown on his signatures there. If he always signed with the same ink it would follow that those signatures would all be in the same ink.

246

Cross-Examination by Mr. Struett.

I did not examine any of the writing in Government's Exhibits CB 1, J 1, CB 2, and GL 1.

Redirect Examination by Mr. Hall.

I had sufficient time to examine the documents that I have testified I did examine and to make the conclusions that I have stated on the witness stand. When I gave my opinion that all of the employment contracts, with their respective exhibit numbers, from 1930 to 1936, both inclusive, were signed at the same time by each individual who signed them, I based my opinion upon the signatures and not upon the typewriting.

Recross Examination by Mr. McInerney.

I would regard ordinary business use of a typewriter to include at least one page of typewriting every two days. Counsel for defendants asked if the witness knew of any place where they paid someone for writing a page of typewriting every two days. Objection thereto was sustained. On Government's Exhibit 95 the signature of William Molasky appears in two places. I said that Molasky's signatures on the contracts for 1933 and 1935, which you hand me, were written in the same color of ink, varying only in density. I will show the differences to the jury. Here in the writing of the word "William," which is on Government's Exhibit 86, under date of 1933, at the end of the word "William" in the writing of the "a" and "m", especially, the ink is very dense, giving a darker appearance, not a difference in color but in density alone as compared to a stroke in the "y" in the lower signature on the same exhibit. Now, the words, looking at the portion of the "y" where the ink is comparatively thin and comparing it to the "m" in the signature, however, which is comparatively thick, there is a definite difference in density. That is one example of it.

I now point to the signature under the same date of 1933, which shows to a minor extent the same differences in density between the "m" and between writings in the last part of the signature.

247 Now, I now take the dense part of the "m" on the first page of this contract, all dated in 1933, all dated the same day in 1933, and lay it against a lighter portion of the "m" in the third page of the contract and point out the difference in density.

Now, I now take the employment contract under date of 1936 and spread it out so that the various signatures can be seen all at once and again there are variations in dense and light parts of the signature. As a whole, these three signatures show less variation in density and less density than those in 1933.

Now, a further check of the study may be made by taking the light part of the signature in 1933 and laying it against the darker part of a signature dated 1936, where both the color and the density are exactly the same.

Does that answer your question?

Mr. McInerney: Q. You conclude from that, then, that

because of the similarity that you just described you assume that they had to be signed at the same time?

A. That in combination with the features that I have reviewed.

Men acquire habits in signatures and use pressure at different points when they write. If I were handed two documents that I had never seen before I could not necessarily tell if they were signed by the same man regardless of how far apart they were signed. I would not have any trouble identifying two signatures because they were not signed on the same day. The fact that there are variations or differences in density in certain parts of a signature on several documents would not in itself convince me that they were or were not necessarily signed at the same time.

Recross Examination by Mr. Struett.

I testified that Mr. Molasky's employment contracts were signed at two different times, that is, the contracts dated from 1930 to 1936, but not the 1938 you handed me. In my opinion those in 1930, 1931 and 1932 were signed at the same time, and those in 1933, 1934, 1935 and 1936 were signed at one time. However, I have no opinion as to whether or not upon signing one group Mr. Molasky dropped his pen and took a different one and signed another group or not. He may or may not have but at least the two groups of signatures are definitely divided within that group and within that group those signatures were signed at one time.

I have accepted Lester Kruse's contracts inasmuch as I had no samples, but as to Mr. Ragen, Jr., it is my opinion that the contracts which he signed he signed all at one time within the group 1930 to 1936. I have not expressed an opinion as to what year he signed those. I have no opinion as to that.

As to A. W. Kruse, as I recall, he signed only three and in my opinion those three were all signed at one time. I have no opinion as to when it was.

Re-redirect Examination by Mr. Hall.

The opinion which I gave on direct examination was not based entirely on density.

249 HOWARD CLARK, called by the Court as a Court's witness at the request of the Government, testified as follows:

Cross-Examination by Mr. Hall.

My name is Howard Clark. I was subpoenaed as a Government witness in this case and arrived in this city last Tuesday night. Before I arrived, I notified Mr. Burris that I was coming. He asked me to notify him before I left or when I arrived in Chicago, and I notified him before I left.

When I arrived in Chicago, I met Mr. Kruse in the lobby of the Atlantic Hotel, as I was going into the hotel to check in. I talked to him in my room in the presence of his two attorneys.

I worked on the books of the Consensus Publishing Company. I recall the organization of the company. I was one of the original incorporators. My signature appears on Government's Exhibit 67 as such. Arnold W. Kruse asked me to sign the document. I subscribed for twenty shares of stock when the company was organized. Kruse told me to do it. I paid nothing for the stock. Held it for a short time. I saw it when the stock certificate was first filled out by the stenographer. Kruse gave it to me to sign in his office. I signed it and gave it right back to Kruse at his direction. Do not know what Kruse did with it. Never saw it again. I endorsed it in blank on the back.

On Government's Exhibit 67 and on the original articles of incorporation, Government's Exhibit 59, my signature on the fifth page looks like it is written over an erasure. I do not know what was written there and erased. Do not know who erased it. I cannot tell the name that was written and erased, but I can see what looks like a "K" there. I told the United States Attorney in his office that it could be Arnold Kruse. Do not know why it was erased and my signature written over it.

250 I set up the book system of the Consensus Publishing Company at Mr. Kruse's direction. Mr. Kruse did not in detail particularly tell me the kind of a book system to set up. At that time, in 1929, when I set up the books in the office, there were besides Mr. Kruse and my-

self, George Matheis and a stenographer. I was in the same office with Mr. Kruse. There was one typewriter in that office.

Mr. Kruse explained to me how to make certain charges in the books. At the time we started to keep the books, Mr. Kruse told me that he would for me to keep the books. He said, "Now, there will be certain expenses incurred by Mr. Molasky in St. Louis. The accounts receivable will be kept by him, the cash collections will be made by him. Each day he will send you a duplicate deposit ticket of the money put in the bank at St. Louis. At the end of the week, he will wire you the amount of deposits for that particular day, together with the total deposits. You will then transfer that whole amount to the First National Bank in Chicago. You will reimburse Mr. Molasky for the expenses incurred by him in St. Louis. There will be certain expenses that you will pay in this fashion. You will pay to Mr. Molasky, Mr. Ragen and myself, 30%, 20% and 20%, respectively, of the total amount that Mr. Molasky collected, less the expenses incurred by Mr. Molasky in St. Louis, and charge them to commissions." I made up that kind of a bookkeeping system so far as the charges were concerned.

The entries in Government's Exhibits CB 1, CB 2, from the beginning until May, 1933, are in my handwriting. The same for Government's Exhibit J 1. I entered the recap of Mr. Molasky's expenses in the journal. I did not enter the expense there. Then I drew checks each week, distributing the money in the percentages that

Kruse told me. I distributed 100% of the money remaining after Mr. Molasky's payments and any other incidental expenses, to those people in those percentages each week. I have been an accountant since 1922, doing general bookkeeping work from 1922 to 1933. I know the difference between commissions and dividends. A dividend is the distribution of net profits of corporation to its stockholders after formal action by the board. Commission is an expense.

I consider it important for income tax purposes to distinguish between dividends and commissions. I would not call something a dividend if it was a commission.

My handwriting appears on twelve of the sheets in Government's Exhibits WP 1 to WP 29. Exhibits WP 1 to and including WP 12 are all in my handwriting. The

first word on each page under "Disbursements" is "Dividends" in my handwriting. It is the same on all of those sheets. I understood the meaning of the word "Dividends" when I wrote it there. I did not write the word "Commissions" there at all.

No one instructed me to make up these sheets. I made them up myself. I computed the amount of receipts on each of these sheets for a week, the expenses of Molasky, the deductions and the divisions of 20%, 20% and 30%, and distributed it accordingly. I put that down as dividends. I took off those work papers the expenses incurred by Molasky in St. Louis, and made a journal entry. The entries in the cash book came from the check stubs. I did not figure the amount to each person on those sheets. I lumped it all down below. I figured that out on a piece of scratch paper. When it came to making the charges in the cash book, I treated the items that I wrote as "Dividends" on my work papers—by charging those portions payable to Mr. Molasky, Mr. Ragen and Mr. Kruse to "Commissions", and the portion that was paid to the Cecelia Investment Company I charged to "Dividends", yet Cecelia got 30%, the same as Molasky got 30% and the other two, 20% each. It all came out of the same account. I wrote "Dividends" in my private work papers and "Commissions" in my cash books.

I signed Government's Exhibit 75 to 94, being the employment contracts. Do not know when I signed them. Don't recall anything about it. Don't even remember signing them. Do not know who asked me to sign them. The stock certificate in Government's Exhibit 59, made out in my name, with the name Consensus Publishing Company typewritten in, bears my signature. I do not remember ever having seen that certificate. I do remember signing stock certificates, but I do not remember when I signed that one or any of them. To my knowledge, they did not have any other stock certificates for the Consensus Publishing Company.

I do not remember having seen a Consensus Publishing Company stock certificate with the name Consensus Publishing Company printed.

I saw the originals of Government's Exhibits 107 and 108, with the name Consensus Publishing Company printed in, because I made them out myself.

Referring to the work papers, WP 1 to WP 12, I wrote the word "Dividend" for the amounts of the percentages that were disbursed each week because I made up the little work sheet for myself, by myself, and for nobody else at the time. Those are merely the receipts as shown by Mr. Molasky, the information Mr. Molasky sent me and the expenses as he had them listed on the sheets that he sent. The object of that was to get a total of the expenses so that I could make a journal entry and post them to the ledger.

Then Mr. Kruse said to me, "When you send the check to Mr. Molasky, and Mr. Ragen, and to the Cecelia 253 Investment Company, I wish you would make them up a little statement showing the expenses and the receipts and also the commission." So I merely put it on this, and Kruse also said, "Also show the bank account." So I merely took the sheet that I had already written up for myself and stuck down at the bottom the bank account, and I threw the whole amount, both commissions and dividends, into the one account and called it "Dividend" and sent it out that way. It is important to distinguish between commissions and dividends.

Government's Exhibit WP 12, a typical illustration of these work sheets, in WP1 to WP12 is as follows:

GOVERNMENT'S EXHIBIT WP 12.

Consensus Pub. Co.

414

Bill of Exceptions.

| | 1-7-33 | 1-14-33 | 1-21-33 | 1-28-33 | 2-4-33 | 2-11-33 | 2-18-33 | 2-25-33 | 3-4-33 | 3-11-33 | 3-18-33 | 3-25-33 |
|-------------------------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|
| Receipts | 2,167.67 | 2,182.55 | 2,245.45 | 2,274.53 | 2,337.33 | 2,443.30 | 2,311.42 | 2,353.04 | — | 4,451.76 | 3,593.12 | 2,164.37 |
| Expenses | | | | | | | | | | | | |
| Checks, N. S. F. | | | 15.69 | | | 18.75 | | | 677.17 | 206.62 | 316.43 | 20.88 |
| Delivery | 80.00 | 80.00 | 80.00 | 80.00 | 90.00 | 80.00 | 90.00 | 85.00 | 85.00 | 85.00 | 85.00 | 85.00 |
| Elec. & Gas | 12.88 | | | 8.52 | | 6.13 | | | 6.46 | 5.41 | | |
| Exchange | 2.97 | 2.00 | 2.00 | 2.00 | 5.69 | 2.08 | 1.17 | | | 1.27 | | 1.59 |
| Express & Postage .. | 59.47 | 57.98 | 65.87 | 94.69 | 73.80 | 81.18 | 86.78 | 91.75 | 3.64 | 2.00 | 2.00 | 2.00 |
| General | 4.55 | 1.25 | .40 | | | 17.70 | .52 | | 88.14 | 63.24 | 47.88 | 79.85 |
| Interest | | | 7.95 | | | 8.45 | | | | 1.55 | | |
| Insurance | | | | | | | | | | 8.95 | | |
| Labor | 114.78 | 114.78 | 114.78 | 114.78 | 138.78 | 126.78 | 126.78 | 126.78 | 126.78 | 126.78 | 126.78 | 126.78 |
| Legal Fees | | | | | | | | | | | | |
| Mech. Supp. & Rep. .. | | | | | | 2.50 | | | | | 8.68 | |
| Office | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 |
| Paper & Cards Stk. .. | | 106.68 | 106.68 | | | | | | | | 6.00 | |
| Printing—Cincy | 125.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |
| Rent | 10.00 | 10.00 | 10.00 | 10.00 | 10.00 | 10.00 | 10.00 | 10.00 | 10.00 | 10.00 | 10.00 | 10.00 |
| Salaries—Cincy | 125.00 | 125.00 | 125.00 | 125.00 | 125.00 | 125.00 | 125.00 | 125.00 | 125.00 | 125.00 | 125.00 | 125.00 |
| Owens | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |
| Staty. & Office Sup. .. | 35.55 | 2.25 | | | | | | | | | | |
| Taxes | | | | | | | | | | | | |
| Tel. & Tel. | 6.72 | 5.24 | 16.90 | .63 | 11.78 | 6.33 | 27.29 | 5.02 | 13.82 | | 22.56 | 2.14 |
| Travelling | 50.00 | | 35.00 | 50.00 | 50.00 | | | | | | | |
| Total Expenses | 701.92 | 633.60 | 815.27 | 670.62 | 740.05 | 710.00 | 704.64 | 690.15 | 1,371.01 | 871.32 | | |
| | | | | | | | | | 1,371.01 | 1,371.01 | | |

| | | | | | | | | | | | |
|------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Profit | 1,405.75 | 1,549.05 | 1,430.18 | 1,903.91 | 1,597.28 | 1,723.40 | 1,006.88 | 1,673.00 | 2,209.43 | 2,007.79 | 1,476.13 |
| Bank Account | | | | | | | | | | | |
| Balance | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |
| Profits | 1,405.75 | 1,549.05 | 1,430.18 | 1,903.91 | 1,597.28 | 1,723.40 | 1,006.88 | 1,673.09 | 2,209.43 | 2,007.79 | 1,476.13 |
| | 1,505.75 | 1,649.05 | 1,530.18 | 1,793.91 | 1,697.28 | 1,823.40 | 1,706.88 | 1,773.09 | 2,309.43 | 2,707.79 | 1,576.13 |
| Disbursements | | | | | | | | | | | |
| Dividends | 1,405.75 | 1,549.05 | 1,330.18 | 1,603.91 | 1,597.28 | 1,623.40 | 1,606.88 | 702.02 | 2,109.43 | 2,007.79 | 1,476.13 |
| Income Tax | | | | | | | | 976.47 | | | |
| Note—Machy | | | 100.00 | | | 100.00 | | | 100.00 | | |
| Balance | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |
| Circulation | | | | | | | | | | | |
| Draw | St. Louis | St. Louis | St. Louis | St. Louis | St. Louis | St. Louis | St. Louis | St. Louis | St. Louis | St. Louis | St. Louis |
| Returns | 37.05 | 37.31 | 37.06 | 39.92 | 40.17 | 40.21 | 40.61 | 40.62 | 39.97 | 49.82 | 49.82 |
| | 3.72 | 3.19 | 3.19 | 2.59 | 2.42 | 2.74 | 4.06 | 3.73 | 6.77 | 5.04 | 5.04 |
| Net | 33.33 | 34.12 | 34.47 | 37.33 | 37.74 | 37.47 | 36.55 | 36.89 | 33.20 | 44.75 | 44.75 |
| | Cincy | Cincy | Cincy | Cincy | Cincy | Cincy | Cincy | Cincy | Cincy | Cincy | Cincy |
| Draw | 51.53 | 49.09 | 49.84 | 52.72 | 52.43 | 52.45 | 53.40 | 53.96 | 51.97 | 50.98 | 50.98 |
| Returns | 8.70 | 12.00 | 9.03 | 8.47 | 7.40 | 6.01 | 9.60 | 6.99 | 11.46 | 11.19 | 11.19 |
| Net | 42.83 | 36.49 | 40.81 | 44.25 | 45.03 | 46.04 | 43.80 | 46.97 | 40.51 | 39.81 | 39.81 |

256 Government's Exhibit 109 bears Mr. Kruse's signature. I don't remember ever seeing a stock certificate of the Consensus Publishing Company for thirty shares in the name of Cecelia Investment Company.

I know that original stock of that company was issued in the name of Jules Taylor. I do not know if that is the certificate mentioned and described in that letter.

Cross-Examination by Mr. Struett.

The Consensus was engaged in the run-down business selling run-down sheets.

I remember one afternoon in the office Arnold Kruse and Molasky were in there. A short time later, Mr. Annenberg came in. They were talking between themselves. I was at my desk. Soon, Mr. Annenberg called Ragen, Sr., on the phone. He said, "Jim, will you come over right away." When Mr. Ragen came there, Mr. Annenberg said, "We are going to start a run-down business in St. Louis. Now, I own the business, I think I am entitled to 30%. Mr. Molasky is going to do the work down there. I think he is entitled to 30%, and you two" indicating Ragen, Sr., and Arnold Kruse, "I think you are entitled, you two are entitled to the balance, or 20% each."

I made the opening entries and those following in Government's Exhibit CB 1 up to 1933, when I left. There isn't any question but what Kruse told me to make those entries as they are made therein. The same is true of the general ledger and the journal. Those books are in the identical shape now as they were then. The entries that I made originally are in there. They have not been tampered with, they have not been erased or anything else.

257 Kruse did not at any time tell me to make any changes in any of those books after I originally set them up. I discussed this case with Mr. Hall, the Assistant United States Attorney. Counsel for defendants asked, "Did Mr. Hall ever ask you whether or not it was a fact that Mr. Annenberg owned all this stock and that these three men were only dummies?" The United States Attorney objected to that. The court sustained the objection on the ground that it was immaterial, because it made no difference what questions the defense or Government asked this witness. Counsel for defendants stated

that the Government has had a theory that Annenberg owned the stock and that these three people were merely dummies, and therefore the question was competent.

Cross-Examination by Mr. McInerney.

I left Chicago to go to Wyoming on May 5, 1933. Then I went to M. L. Annenberg's ranch in Wyoming. I was totally disabled then. Went there to regain my health. Stayed there until October 18, 1934, a year and a half. I was receiving compensation from these companies all that time. In October, 1934, I entered a sanitarium in Ottumwa, Iowa, where I now reside. Remained there until the spring of 1935. I had no active life then. Kept no books or did anything. Was in bed all the time. I have been in Ottumwa ever since with the exception of six months in Chicago, during which time I worked for the Cecelia Company in the office. I have not received compensation since 1933 until today.

I wrote a lot of work sheets and used the word "Dividends". The work sheets are no part of any permanent record of the company except that the first part, the copy of the expenses that Molasky sent from St. Louis, which I used to make my journal entry. They have no place in a scheme of bookkeeping. I first entered those expenses on the work sheets. The first part of the work sheet shows the items as disclosed by Molasky's weekly statement, expenses that Molasky advanced in St. Louis. At the end of each month I would take the total of the expenses from the work sheets for the number of Saturdays in that month and enter them in the journal. From there on down, on the work sheet, there is an item, "Total Expenses", which means the total expenses referred to from Molasky's sheet. Then the work sheet shows an item of profit and shows the bank account. Those were all accurately taken from Molasky's statement. Then the item "Disbursements" appears, that is, the disbursements of the difference between the receipts and the expenses incurred by Molasky, that is what was left. That was distributed by checks to Cecelia and to those three gentlemen for 30, 20 and 20. Those were then recorded on the work sheets. Those were entered on the work sheets before the checks were made out. I wrote "Disbursements", that is, dividends, and included all these

payments, including the commissions so-called. I completed this before I did anything else. Then after completing the work sheet, I took the checkbook and wrote the checks to reflect what was on there. I made no notation on the check stubs to indicate what the payments were for. The next entry was to enter the checks from the check stubs into the cash book, into Government's Exhibit CB 1. In every instance, the payments to the Kruses, the Ragens or the Molasky or the B. Hoffmans were recorded as commissions. When I made the entries

in the cash disbursements book, it was not necessary 259 to have this work sheet before me. After the entries were made and the books were balanced, there was no reason for keeping the work sheets. It is just that one was pinned on top of the other and thrown into a file. There was no reason, from a bookkeeping standpoint, why the work papers were kept around the place at all after they have served their purpose.

All of the work sheets are not there. They started out October 24, 1931, and there are sheets before that from the latter part of September, 1929.

By Mr. Hall: They were not all delivered to the Government under the subpoena.

My not adding the word "Commissions" to the work sheets was purely neglect on my part. I did not have any idea that there was anything wrong about commissions being paid.

A dividend is a distribution of profits of a corporation to stockholders pursuant to authority of the board of directors. I do not know about any action of the board of directors of the Consensus Publishing Company with reference to dividends.

I made no investigation of the subject, and never examined the minute books and records of the Consensus Publishing Company. I never had occasion to do that.

In September, 1929, I heard a conversation in the office of the company, where M. L. Annenberg, William Molasky, Arnold Kruse and James Ragen, Sr. were present.

Q. As I understand it, those gentlemen were present having a conversation which you heard; is that correct?

A. Yes, it is.

Q. And the substance of it, as you related it yesterday, was that Mr. Annenberg said that they were buying this run-down business and that he owned the company and

that he was going to pay commissions to these three gentlemen, 30, 20, 20; is that right? Is that what you heard?

260 A. No, he didn't say it in those words. I can recall it for you.

Q. I would like to have you tell me now what you recall of that conversation?

A. Mr. Annenberg said, "We are going to start a run-down business in St. Louis." "Now," he said, "I own the business. I think I am entitled to 30%. Mr. Molasky is going to do the work down there; I think he is entitled to 30%. And you two," indicating Mr. Ragen, Sr., and Mr. Arnold Kruse, "are entitled to 20% each; are entitled to the balance or to 20% each."

Nothing was said about what services Ragen and Kruse were to perform. Nothing was said about whether they were to be paid as commissions or as stockholders. Nothing was said in that conversation about the formation of a corporation. Molasky, Kruse and Ragen said nothing in response to the statement of M. L. Annenberg. Then after a lapse of a few seconds Mr. Annenberg, in his usual manner, said, "Well, what next," or "Anything else," or words to that effect. He just told them and that was all.

Redirect Examination by Mr. Hall.

That conversation was probably ten days or two weeks before the charter was issued for Consensus. It was in September, 1929, about eleven years ago. Offhand I do not remember of any other time when the four of them, Annenberg, A. W. Kruse, Ragen, Sr., and Molasky were in the office together. I have seen some of the parties together with Annenberg since then. Annenberg has been with Kruse any number of times. Ragen was in and out of the office considerably. I can't remember any particular time of ever seeing Mr. Annenberg, Mr. Kruse and Mr. Ragen together. Offhand I can't think of any conversation between them when Mr. Kruse, Mr. Annenberg and Mr.

Ragen were together. I do not remember anything
261 particular that Annenberg ever said to Kruse and Ragen together since then.

The office then was at 441 Plymouth Court, on the second floor front. It was probably about 25 or 30 feet square. There were four desks, several filing cabinets, a davenport, three or four extra chairs, an adding machine, type-

writer, check protector, and a little safe in that office. Mr. Kruse, George Matheis, a stenographer and myself were in the office. Miss Aronson was the stenographer who started in November, 1929. She was there until I left and before that there was a Miss Cohen. My desk faced Matheis' desk. My desk was in the southwest corner facing the north. Matheis' desk was in the center of the room facing the east. Mr. Kruse's desk was opposite from mine, in the northwest corner, clear across the room. Kruse's desk was set out considerably from the wall and faced a southeasterly direction. It was about twelve feet from my desk.

The conference took place at A. W. Kruse's desk. I was listening in on the conference. I was facing them. They did not ask me to listen in. Mr. Kruse and Mr. Molasky were there first. Annenberg came in after they were there. It was in the late afternoon. When Annenberg came in he gave the usual greetings, "How are you" and "How is everybody." I don't remember the first thing said or what they talked about at the start. I took no interest in the conversation until Mr. Annenberg called Ragen on the phone. I had never heard of the run-down business before that. In general I knew what run-down sheets were and I assumed that the business was the printing and distribution thereof. I had no reason to be interested in that conversation only that I was nosey.

262 There were not many conversations in that office between those principals.

I have seen Annenberg and A. W. Kruse together a great many times since then. Annenberg used to come to town every couple of weeks or a month. They have not always been in that office. I have seen Annenberg and Kruse there since then. I cannot recall anything in particular that they ever said. I beg your pardon, I do recall. I didn't understand you. They invariably talked about the business in general. I never heard Annenberg and Kruse discuss the run-down business after that time.

After that time I don't remember any particular time when Annenberg called Ragen on the telephone from that office, or that he did or did not call Ragen again.

I do not know the exact date when the R. D. Publishing Company in Buffalo started up, but it was some time after that. I know it was after that because I set up those books also. I do not remember any conversation between Annenberg, Kruse, Ragen and Molasky about the R. D. Publishing

Company at Buffalo. I do remember a conversation of Mr. Molasky and Mr. Kruse, however. The R. D. Publishing Company was in the same kind of business as Consensus, but it was in Buffalo and Consensus was in St. Louis. The R. D. Publishing Company was probably organized in 1930 or 1931. I remember the exact date of the Consensus Publishing Company organization because the United States Attorney showed those to me a year ago and last summer and last week.

I was working for one of the subsidiaries of the Cecelia Company.

Ragen, Kruse and Molasky owned interests in the R. D. Publishing Company at Buffalo.

263 Mr. Hall: Q. Now, will you give us that conversation again, Mr. Clark?

Mr. Annenberg said, "We are thinking about starting a run-down business in St. Louis. Now, I own the business. I think I am entitled to 30 per cent. Mr. Molasky is going to do the work down there. I think he is entitled to 30 per cent; and you two," indicating Mr. Ragen, Sr., and Mr. Arnold Kruse, "I think are entitled to the balance or 20 per cent each." I do not have that memorized. I have given that conversation in exactly the same language three different times. I did not go over this conversation with Mr. Kruse. I went over the conversation in my hotel room the evening I had the conference with Mr. Canaday. Kruse was there. Kruse did not talk to me.

The books of the Consensus Publishing Company have never been rewritten, but there is an erasure in there. I did not tell about it in my testimony. On Government's Exhibit CB 1, page 2-D in the column starting immediately below the name "Zweig" on the right hand side, there is a word "Espense" after a figure of \$468.91. Immediately below that is the word "Cecelia," "\$684.36," and then below that are four figures, one for \$684.36, another for \$456.25, another for \$456.24, and then the word "Comm." There are two ditto marks under that word. Those three things are written over an erasure. I do not know what was written under that before it was erased. I did not tell Mr. Hall, the Assistant United States Attorney, that it undoubtedly was Kruse, Ragen and Molasky. I made the erasure. I assume that it was the day it was put down there, October 12, 1929, probably at the end of the month. I can't tell exactly when I made the erasures, but I do remember a conversation even before that.

The thing that attracted my attention to the particular conversation was the telephone call of Mr. Annenberg. Annenberg said, "Jim, do you want to make some money?" That is what attracted my attention.

Q. Now, you told somebody else about this conversation long before you ever knew me, didn't you?

A. I don't know that I told Mr. Hall that or not.

Q. I mean somebody entirely different.

A. Yes, I did.

Q. You did?

A. Yes, sir.

Q. You told me, did you?

A. Yes, I did.

Q. Whom did you tell it to?

A. I told it to—

Mr. Hall: I object unless the materiality of this appears.

Mr. Struett: Let us find out.

The Court: Objection sustained.

Mr. Struett: If your Honor please, I offer to show that this man told that to his attorney.

The Court: He may have told that to a hundred people. It is wholly immaterial to this case. Objection sustained.

Mr. Struett: If your Honor please, I offer to prove that this man made this same statement to Mr. Hodson who represented him back a long time ago; I would say six months ago.

The Court: Oh, I cannot go into collateral issues like that.

Mr. Struett: All right, I offer to prove it.

The Court: Objection sustained. I have given you my reasons for the ruling.

Mr. Struett: All right.

265 The entries were made at the time I was keeping this, at the time I was copying this in the book from the cash receipts. I did not go back six months later or ten months later or two years later and erase something and put something else there.

I opened the books on the R. D. Publishing Company. I do not know whether or not that was a corporation and had been for twenty years before these people got any interest in it. I do not know whether or not there was any stock issued in connection with the acquisition of that

company to anybody. I did not issue it myself and I didn't have much to do with that corporation. I do not know about the distribution of the proceeds of that company either.

Redirect Examination by Mr. Hall.

I recall that I endorsed a certificate of stock for twenty shares of Consensus Publishing Company in my name and that I gave it to Kruse.

I do not recall anything about the certificate in my name in the forepart of Government's Exhibit 59 for 20 shares of capital stock of the Consensus Publishing Company. It bears my signature. I do not know if that is the certificate I signed in 1929.

GOVERNMENT'S EXHIBITS AW 123 to AW 132, inclusive, and AW 40 to AW 114, inclusive, offered and received in evidence without objection.

266 PHILIP H. MAAS, a witness for the Government, testified as follows:

Direct Examination by Mr. Ziffren.

My name is Philip H. Maas. I live at 1420 Berteau Avenue, Chicago. I am Vice-president of the Rockwell-Barnes Company. It is in the wholesale paper business. I have been vice-president about 22 years. Am familiar with all the brands of paper sold by Rockwell-Barnes Company.

I have examined Government's Exhibits 75 to 95, both inclusive, being employment contracts from 1930 to 1936. The paper in those exhibits was produced by our company. The sheets are our docket bond paper. It is a 25 per cent rag sheet of paper. To my knowledge no other jobber or manufacturer sold that brand of paper. They could not do so without infringing. My company first sold this brand of paper in 1932. I know that this paper with the water-mark therein was not in existence in January of 1930. It was not in existence in January of 1931. That paper was not in existence in January of 1932.

267 JAMES W. HYLAND, a witness for the Government, testified as follows:

Direct Examination by Mr. Hall.

My name is James W. Hyland. I live at 823 Mulford Street, Evanston, Illinois. Am an Internal Revenue Agent in the Bureau of Internal Revenue located at Chicago, Illinois. Have been a Revenue Agent since July 1, 1935, located at Chicago. Since then my duties have included the examination of income tax returns in the field, principally corporations. In this period I have examined approximately 135 returns. Prior to the time I was employed by the Bureau of Internal Revenue in 1935 I had had accounting experience. Was in corporation accounting work for 21 years, having supervision over bookkeepers, keeping corporation books and records, including general ledgers and control ledgers. Did auditing work for such corporations, including the auditing of branches, auditing expense vouchers. Have devised and installed book accounting systems in such corporations during that period. Have drawn trial balances, operating statements showing gross income received and the various expenses in the business. Have prepared financial statements and analyses of operations of businesses. I was employed about six years by the Magnolia Petroleum Company of Texas. I was employed by the Ford Motor Company at Atlanta, Georgia, and also the Flint Motor Company as branch accountant. Since I have been employed by the Bureau of Internal Revenue in 1935, my duties have consisted of making examinations of the books of taxpayers in the nature of an audit of the books and to verify the figures which are on the tax returns. I have done that a great many times.

268 Mr. E. C. Wright is the Internal Revenue Agent in Charge in Chicago. I was assigned to assist in the investigation of the Annenberg cases by Mr. Herrick, who previously was the Internal Revenue Agent in Charge, on or about the 15th day of September, 1936, and I proceeded in that investigation.

I was assigned to investigate the Consensus Publishing Company on November 15, 1936, for the years 1933 and 1934. I proceeded with that investigation at 441 Plymouth Court, Chicago, Illinois, on the premises of the

Annenberg companies. I continued in that investigation for those two years from November 15, 1936, until the latter part of January or the beginning of February, 1937, about four months. Subsequently, I made another examination in the United States Court House at Chicago in the summer of 1939, covering the years 1929 to 1936, inclusive, in the second examination. That examination commenced when the records of the company were delivered to the Government under grand jury subpoena and it continued through the summer. In the first examination in 1936 I went over the general ledger, two cash books, journal, minute book containing the stock certificates, cancelled checks, bank statements, and the weekly reports of the St. Louis office. All of those records are in evidence in this case. Government's Exhibits CB 1 and CB 2 are the cash books. GL 1 is the general ledger, and J 1 is the journal. Government's Exhibit 59 is the minute book shown to me by the company with stock certificates in front.

When I was investigating this matter from November, 1936, to January, 1937, they did not give me any written employment contracts introduced in evidence in this case.

The employment contracts were delivered under subpoena, as well as all other records that have been introduced in this case. In my investigation in the summer of 1939 I examined all the records submitted under the subpoena. I checked the cash received as reported on the cash book into the bank accounts and ascertained that all checks entered in the cash book had been charged against the bank accounts. I examined all the expense accounts and other entries in the books and records that have been introduced in evidence here. Examined the receipts and expenses as reflected by the cash books, CB 1 and CB 2, to ascertain gross income and net income as reflected thereby. Examined the bank account of the Consensus Publishing Company with the Mississippi Valley Trust Company and the First National Bank of Chicago. I ascertained that all of the items of income entered the cash books had been deposited in the account with the Mississippi Valley Trust Company. In October of 1929, when that account was opened, all of the funds deposited there were transferred from that account to an account with the First National Bank of Chicago in the name of the Consensus Publishing Company. That continued until November of 1934, when they discontinued the

account with the First National Bank and distributed directly from the account with the Mississippi Valley Trust Company.

I have computed the totals of the items of income entered in the cash books, CB 1 and CB 2, for the years 1929 to 1936, both inclusive. These totals are as follows: 1929, \$29,469.64; 1930, \$132,075.47; 1931, \$139,760.60; 1932, \$125,526.94; 1933, \$119,960.96; 1934, \$129,665.78; 1935, \$149,881.61; 1936, \$212,562.00.

I have sat in the courtroom here throughout this trial and have seen all of the exhibits offered and admitted 270 in evidence by and for the Government. I am familiar with those exhibits.

I ascertained from the cash book that certain percentage payments have been charged as commissions. Have computed the totals of the percentage payments charged as commissions during the years 1929 to 1936, both inclusive, as follows: 1929, \$10,761.44; 1930, \$62,961.22; 1931, \$64,790.80; 1932, \$57,254.57; 1933, \$54,537.65; 1934, \$60,172.23; 1935, \$76,713.75; 1936, \$119,755.78. As shown by the cash books these payments and the respective percentage charged to each person for each of these years are as follows: In 1929 William Molasky was charged with thirty per cent of the balance left after deducting expenses from the total amount of income. This thirty per cent amounted to \$4,612.04. A. W. Kruse was charged with twenty per cent in the amount of \$3,074.73. James M. Ragen was charged with twenty per cent in the amount of \$3,074.67. In 1930 William Molasky was charged with thirty per cent in the amount of \$26,983.31. A. W. Kruse was charged with twenty per cent amounting to \$17,989.00. James M. Ragen, Sr., was charged with twenty per cent amounting to \$17,988.91. In the year 1931 William Molasky was charged with thirty per cent amounting to \$27,767.47. A. W. Kruse was charged with twenty per cent amounting to \$18,511.78. James Ragen, Sr., was charged with twenty per cent covering checks issued up to March 19, 1931, amounting to \$3,840.22, and James Ragen, Jr., was charged with twenty per cent covering checks issued after April 3, 1931, for the balance of the year amounting to \$14,671.36.

271 In 1932 William Molasky was charged with twenty per cent amounting to \$24,537.67. A. W. Kruse was charged with twenty per cent covering checks up to and including check issued on August 4, 1932, in the total sum

of \$10,428.42. Mrs. A. W. Kruse was charged with twenty per cent beginning with a check issued on August 11, 1932, and continuing for the balance of the year totaling \$5,930.06. I have examined the checks issued in the name of Mrs. A. W. Kruse in 1932 introduced in evidence here to ascertain where those checks were deposited. Of the total amount of \$5,930.06 in 1932, \$4,325.86 was deposited in A. W. Kruse's savings account number 737109 with the First National Bank of Chicago and \$1,604.20 of that amount was deposited in A. W. Kruse's special savings account number 973655 with the First National Bank of Chicago. In 1932 James Ragen, Jr., was charged with twenty per cent amounting to \$16,358.42.

In the year 1933 William Molasky was charged with fifteen per cent in the total amount of \$11,686.61. B. Hoffman was charged with fifteen per cent in the amount of \$11,686.60 beginning the first of the year. I have examined the checks in evidence here and found that the checks which were issued in 1933 in the name of B. Hoffman were deposited in the account of William Molasky with the Mississippi Valley Trust Company at St. Louis, Missouri. In 1933 Mrs. A. W. Kruse was charged with twenty per cent including checks that were issued from the beginning of the year to March 16, 1933, totaling \$2,993.55. These checks issued in the name of Mrs. A. W. Kruse were deposited in A. W. Kruse's special savings account number 973655 in the First National Bank of Chicago. Beginning with March 23, 1933, and continuing

for the balance of the year Lester Kruse was charged 272 with twenty per cent amounting to \$12,588.71. These checks issued in the name of Lester Kruse were deposited in A. W. Kruse's special savings account No. 973655 with the First National Bank of Chicago. In 1933 James M. Ragen, Jr., was charged with twenty per cent amounting to \$15,582.18. Of the checks issued in the name of James M. Ragen, Jr., in 1933, \$11,878.36 was deposited in James M. Ragen, Jr.'s account at the Continental Illinois Bank of Chicago; \$2,885.67 was deposited in A. W. Kruse's checking account, and the balance, approximately three checks, were cashed.

In 1934 William Molasky was charged with fifteen per cent amounting to \$12,894.11. B. Hoffman was charged with fifteen per cent amounting to \$12,894.03. Lester Kruse was charged with twenty per cent amounting to \$17,192.05. James M. Ragen, Jr., was charged with twenty per cent amounting to \$17,192.04.

In 1932 and 1933 A. W. Kruse was the only authorized signer on the bank accounts that the checks payable to Lester Kruse were deposited in. Lester could not draw on these accounts.

In 1934 the checks issued in the name of William Molasky totaling fifteen per cent were deposited in the account of William Molasky with the Mississippi Valley Trust Company of St. Louis, and the checks issued in the name of B. Hoffman for fifteen per cent were deposited in the same bank account. In 1934 the checks issued in the name of Lester Kruse were deposited as follows: \$15,102.79 in A. W. Kruse's special savings account No. 973655; Lester Kruse could not draw on this account. \$2,089.26 was deposited in an account in the name of Lester Kruse with the First National Bank of Chicago.

Arnold Kruse could draw on that account. In 1934 273 the checks issued to James M. Ragen, Jr., were deposited in his checking account with the Continental Illinois National Bank of Chicago.

In 1935 William Molasky was charged with fifteen per cent amounting to \$16,438.66. B. Hoffman was charged with fifteen per cent amounting to \$16,438.64. Lester Kruse was charged with twenty per cent amounting to \$21,918.94, and James M. Ragen, Jr., was charged with twenty per cent amounting to \$21,918.21.

In 1935 the checks for fifteen per cent issued in the name of William Molasky and the checks issued in the name of B. Hoffman for fifteen per cent were deposited in the account of William Molasky in the Mississippi Valley Trust Company, St. Louis. The checks issued in the name of Lester Kruse were deposited in an account in the name of Lester Kruse with the First National Bank of Chicago and Arnold W. Kruse could draw on that account. In 1935 the checks issued in the name of James M. Ragen, Jr., were deposited in his account with the Continental Illinois Bank of Chicago.

In 1936 William Molasky was charged with fifteen per cent amounting to \$25,661.95. B. Hoffman was charged with fifteen per cent in the amount of \$25,661.97. Lester Kruse was charged with twenty per cent in the amount of \$34,215.96. James M. Ragen, Jr., was charged with twenty per cent amounting to \$34,215.90.

In 1936 the checks issued in the name of William Molasky for fifteen per cent and in the name of B. Hoffman for fifteen per cent were deposited in the account

of William Molasky with the Mississippi Valley Trust Company of St. Louis. The checks issued in the name of Lester Kruse were deposited in the account of 274 Lester Kruse with the First National Bank of Chicago and Arnold Kruse could draw on that account. The checks issued in the name of James M. Ragen, Jr., were deposited in his account with the Continental Illinois National Bank of Chicago.

From 1933 to 1936 B. Hoffman could not draw on the account of William Molasky with the Mississippi Valley Trust Company.

In 1937, without giving the amounts, William Molasky was charged with thirty per cent; Lester Kruse was not charged at all; A. W. Kruse was charged with twenty per cent, and James M. Ragen, Jr., was charged with twenty per cent.

I am familiar with the photostatic copies of the checks drawn on the accounts of Arnold W. Kruse that have been introduced in evidence in this case. Am also familiar with the photostatic copies of the checks that were drawn on the account of Lester Kruse and introduced in evidence here. With the exception of five or six checks, Arnold W. Kruse drew all of the checks on the account of Lester Kruse on the moneys that I have testified were deposited in that account.

Checks of the Consensus Publishing Company were issued and paid by the company in accordance with the charges in the books. I have verified this from the records of the bank accounts. All of these checks were charged on the cash books as commissions. I have examined the tax returns of the Consensus Publishing Company for the years 1929 to 1936, inclusive. The total of all of the charges of commissions on the books of the company that I have testified about were deducted from the income reported in the income tax returns for each of the different years, 1929 to 1936, and no tax was paid by the company on those amounts.

275 I have computed the totals of the items of expenses in the cash books, Government's Exhibits CB 1 and CB 2, including the items mentioned in the weekly reports submitted by William Molasky which are in evidence, but excluding the percentage payments charged as commissions during the years 1929 to 1936. These totals are: 1929, \$12,479.52; in the year 1930, \$47,225.84; in the year 1931, \$39,009.40; in the year 1932, \$40,040.48; in the

year 1933, \$38,789.16; in the year 1934, \$40,227.84; in the year 1935, \$37,374.32; in the year 1936, \$37,854.89.

The differences between the figures of total income that I have previously testified to and the expenses that I have just enumerated for each of these years is as follows: In the year 1929, \$16,990.12; in the year 1930, \$84,849.63; in the year 1931, \$100,751.20; in the year 1932, \$85,486.46; in the year 1933, \$81,171.80; in the year 1934, \$89,437.94; in the year 1935, \$112,507.29; in the year 1936, \$174,707.11.

Q. Now, Mr. Hyland, directing your attention to the total of expenses excluding the commission payments that you gave a moment ago, will you please give the items of expenses included in those totals for each year as shown by the cash book CB-1 and CB-2?

Mr. Struett: If your Honor please, I will object to that; there isn't any question about that setup in the indictment.

Mr. Hall: If the Court please, I have no desire to read off a long list of expenses. The purpose of this, of course is to furnish a basis for a hypothetical question. If there is no objection to that part of the hypothetical question then we can dispense with the reading of these lists.

The Court: Well, I think you can cover that by asking him if he is familiar with all the items of expenses that are shown on all these various exhibits received in evidence, and these reports and a notation of what they are.

Mr. Hall: Please answer that question, Mr. Witness.

The Witness: A. Yes.

276 I have examined the figures on Government's Exhibits 1 to 9, inclusive, being the tax returns of the Consensus Publishing Company from 1929 to 1936, inclusive. In those returns deductions were taken by the Consensus Publishing Company in addition to the items of expense I have just enumerated. I am familiar with those deductions. There were several items in the nature of interest and depreciation. In addition to those deductions there were other deductions taken in those income tax returns as follows: In the year 1929 deductions were made for the payments charged as commissions totaling \$10,761.44. In 1930 deductions for payments charged as commissions totalled \$62,961.22; in 1931 similar deductions in the sum of \$64,790.80; in 1932 similar deductions for

commissions, \$57,254.57; in 1933 similar deductions for commissions, \$54,537.65; in 1934 similar deductions for commissions, \$60,172.23; in 1935 similar deductions for commissions, \$76,713.75, and in 1936 similar deductions for commissions in the sum of \$119,755.78. No income tax was paid on these amounts.

Thereupon, the witness was asked a hypothetical question stating assumptions concerning the corporation, its residence, accounting period, application of the Revenue Act of 1928, and stating its gross income for the calendar year 1929 to have been \$29,469.64, and stating deductions to which it was entitled and allowed by the provisions of the Revenue Act of 1928 in the amount of \$12,479.52, consisting of the items of expense enumerated by the witness, exclusive of the percentage payments charged as commissions, and asking how much income tax the corporation owed and should have paid for the year 1929.

277 Mr. Struett: I object to that your Honor as incompetent, irrelevant and immaterial in this case.

Mr. McInerney: If the Court please, I would like your Honor to indulge us a little while because of this question.

I believe it goes to the merits of the whole controversy in general it is an assumption of hypothesis, which is contrary to the evidence of the government. Now, there is an assumption that commissions are not allowable for one penny, whereas—

Mr. Hall: The theory is—

Mr. McInerney: I know what the theory is, but the hypothetical question, may it please the Court, is all right if the basis for it legally is according to the evidence.

The Court: The only way I can condemn that question is to say, as a matter of law, and after all it is entirely a question of fact.

Mr. McInerney: I respectfully suggest it is a question of law if you will permit me to argue it.

The Court: I can't see it that way. Now the question in this case, and the only question after all that will ultimately have to be decided is the question of the actual just expenses—

Mr. McInerney: Yes.

The Court: And isn't that a question of fact—

Mr. McInerney: Now if the Court please, just a moment. You then come to the determination, if your Honor please, as to whether or not the deductions are reasonable.

The Court: Well, wouldn't that be a matter of defense?

Mr. McInerney: Well, let me see now if it is. The Revenue Act, if you will follow me just a minute, I don't want to take too long. I would like to give you what I have in my mind on it. I think the thing will help you on the determination where we are going to go in this lawsuit.

My position is simply this, that a charge is made here that we wilfully attempted to evade the income tax.

Among other things there is a conspiracy count which says that we wilfully conspired to evade it, and the matters alleged, if your Honor please, were certain employment contracts alleged to be executed by the parties pursuant to this unlawful conspiracy by which it was intended no one should perform any services of any kind, nature or description whatever.

- That the allegation in the conspiracy count of the indictment—

278 The Court: I am not going to pass on the ultimate question in this case. I am simply going to decide whether this is a proper question. I don't see the necessity for the jury at this time—well, I am not going to declare my opinion as to the merits of this case, at this time.

Mr. McInerney: I am simply stating the ground for my objection. I am trying to do it at this time, and if there is anything the jury shouldn't hear—

The Court: Go ahead.

Mr. McInerney: The allegation is that no services in fact were rendered of any kind, nature or description; that no one here intended to; that it was merely a device to pay people some money to evade taxes, which they never earned. Not only in amount, but they never worked at all.

Now, that is testimony that is in variance with the record so far as made by the government they did perform some services.

The Court: If I consented to that premise, why, the situation would be entirely different. I can't pass on that. I can't say, that as a matter of law—that after all it is a question of fact for this jury.

Mr. McInerney: Now when you get to the question then that a crime is committed where more than a reasonable amount is paid to any one who performs personal services and the amount of the excess payment is directed to evade taxes you come to another question that no crime of that

sort is defined in the Revenue Act, and if there is any description of a crime it leaves to the determination of somebody else whether or not the price is reasonable and it is not a crime and has been so said by the Supreme Court of the United States.

Now, as to the services that were performed the question of whether a man earned the money, whether he was paid too much cannot be determined for the purpose of dealing with a crime, it comes to the question of the Lever Act case which your Honor undoubtedly remembers very well the last war statute, where a corporation charges a price for its commodities and so forth, and if the Court please—

Mr. Hall: If the Court please I will object to counsel's argument on the facts in this case. I thought it was to be an abstract argument as to what the Court should do on this question.

Mr. McInerney: I am trying to say—

The Court: He is presenting his point.

Mr. McInerney: I am trying to say the specific question is, nothing else being left in this case for determination, of whether they were paid too much or not, then I say there is no crime either alleged in the indictment or made by the statute.

279 The Court: Well, if I could consent to that there would be an entirely different situation. I cannot accept your premises, Mr. McInerney, so I will overrule your objection. I think this question is proper because under this indictment and the evidence submitted. He may answer.

Mr. Hall: Q. Please state the amount of the corporate tax, the corporation should have paid the government.

A. One thousand six hundred seventy eight dollars and eighty-one cents (\$1678.81).

Q. Assuming such a corporation paid to the government for the calendar year 1929 an income tax of three hundred fifty five dollars and fifteen cents (\$355.15), how much would it still owe to the government for that year?

A. Thirteen hundred twenty three dollars and sixty six cents (\$1323.66).

Mr. Hall: After that question, if there is not any objections I will shorten the question.

Mr. McInerney: State the years, will you please, and we may have the same objection, if the Court please?

The Court: The record may show the same objection and the same is overruled and an exception allowed; of course, you don't need exceptions now.

The witness was asked a similar hypothetical question for the calendar year 1930 with the necessary assumptions, and stating the gross income to have been \$132,075.47 and the proper deductions to have been \$47,225.84, consisting of similar items of expense, and asking what income tax the corporation owed and should have paid for that year.

A. Ten thousand one hundred eighty one dollars and ninety-six cents (\$10,181.96).

After the corporation paid the Government \$2,266.61 in income taxes for the year 1930, it would still owe \$7,915.35 for that year.

A similar hypothetical question was asked for the calendar year 1931 with a gross income of \$139,760.60 and deductions of \$39,009.40, and asking the amount of income tax that the corporation owed for that year.

A. Twelve thousand, ninety dollars and fourteen cents (\$12,090.14).

280 If the corporation paid \$4,315.25 for that year, it would still owe \$7,774.89.

A similar hypothetical question was asked for the calendar year 1932 with a gross income of \$125,526.94 and deductions of \$40,040.48, and asking the amount of income tax the corporation owed for that year.

A. Eleven thousand seven hundred fifty four dollars and thirty nine cents (\$11,734.39).

If the corporation paid an income tax of \$3,881.88 for the year 1932, it would still owe \$7,852.51 for that year.

A similar hypothetical question was asked for the calendar year 1933 with a gross income of \$119,960.96 and deductions of \$38,789.16, and asking the amount of income tax the corporation owed for that year.

A. Thirteen thousand three hundred forty dollars and twenty two cents (\$13,340.22).

If the corporation paid \$3,662.20 in income tax for that year, it would still owe \$9,678.02.

A similar hypothetical question was asked for the calendar year 1934 with a gross income of \$129,665.78 and deductions of \$40,227.80, and asking the amount of income tax owed for that year.

A. Fourteen thousand nine hundred ninety five dollars and ninety four cents (\$14,995.94).

If the corporation paid an income tax of \$4,024.04 for that year, it would still owe \$10,971.90.

A similar hypothetical question was asked for the calendar year 1935 with a gross income of \$149,881.51 and deductions of \$37,374.32, and asking the amount of income tax owed by the corporation for that year.

A. Nineteen thousand three hundred eighteen dollars and thirty nine cents (\$19,318.39).

281 If the corporation paid taxes in the sum of \$4,934.56 for that year, it would still owe \$14,383.83.

A similar hypothetical question was asked for the calendar year 1936 with a gross income of \$212,562.00 and deductions of \$37,354.89, and asking how much income tax was due for that year.

A. Twenty five thousand forty six dollars and seven cents (\$25,046.07).

If the corporation paid an income tax of \$7,082.70 for that year, it would still owe \$17,963.37.

I was present when the Consensus Publishing Company delivered the records under grand jury subpoena. Government's Exhibit 29 CR 1, dated October 28, 1929, was delivered by the Consensus Publishing Company under that subpoena. I obtained that document from one of the boxes that was delivered by the Consensus Publishing Company under subpoena. Work papers, Government's Exhibit beginning with WP 1 were also taken from the boxes so delivered under subpoena. Some of those papers are missing for certain years. The papers for the years 1929, 1930 and 1931 were not delivered under the subpoena, and the Government has never had possession of them. The employment contracts were delivered under the subpoena.

I recall a conference in Mr. Hall's office last May when Mr. Molasky and his attorney, Mr. Baron, were present. Mr. Hall and I also were present. I have my notes on that conference. It occurred about May 21, 1940. Mr. Molasky showed us certain documents and among those documents were the photostatic copies of stock certificates that were introduced in evidence here. Some of the other documents were letters, photostatic copies of which are in evidence. Mr. Baron stated that Mr. Molasky wanted to make certain statements and offer certain documents and
282 Mr. Hall advised Mr. Molasky, in Mr. Baron's presence, of his rights under the Constitution and emphasized that anything he said and any evidence he submitted could be used against him. Mr. Baron and Mr.

Molasky stated that they understood that. Mr. Hall further stated that it was with the distinct understanding that there was no agreement between Mr. Molasky and the Government in any way whatsoever relative to any documents that he might submit and to any statements that he would make. This preceded anything that was said or done in connection with this case.

Government's Exhibit 109 is a photostatic copy of a letter dated October 1, 1929, from Arnold W. Kruse to William Molasky. The original of this letter was presented by Mr. Molasky on May 21st. I saw the original. The signature of the defendant A. W. Kruse appears at the bottom. I am familiar with this signature. I had the original letter photostated and this is the photostat. Then I compared the photostat with the original and it was the same, a true and correct copy. I returned the original to Mr. Molasky with the other documents he presented.

GOVERNMENT'S EXHIBIT 109 was offered and received in evidence and is as follows:

October 1, 1929.

Mr. Wm. Molasky,
812 Broadway,
St Louis, Mo.

Dear Bill:

I am enclosing stock certificate #5 of the Consensus Publishing Company made out for thirty shares to the Cecelia Investment Company to which please affix your signature as president and return certificate to me.

This certificate is to replace #2 made out to Jules Taylor. The latter acted as dummy and said certificate has been cancelled.

Sincerely,

AWK:DC

A. W. Kruse.

When I took up my duties with the Revenue Department I acquainted myself with the Treasury ruling and regulations and the statutes concerning revenue. I attended a two months government school in Cleveland, where the government maintains a school to train their men when they come into the government.

The purpose of an audit of income tax returns is to ascertain whether the amount reported on the tax returns is properly reflected on the corporation's records and that the deductions therefrom are proper and in accordance with the Revenue Act. We take each item of deductions as shown in the return and see if it is properly reflected by the records of the corporation, and then we ascertain whether they are proper deductions under the revenue act. I make those determinations myself in the first instance. When I have made my conclusions I write a report setting up the detail on my conclusions and what my views are. I am familiar with the Internal Revenue statute, Sec. 23, entitled "Expense", and I have this statute in mind when I make my examination with reference to deductions. The witness was asked if he was familiar with Treasury Dept. Regulations 103, for 1940, page 70. Objection thereto was sustained, matter of law.

The witness was asked: Do you know about any assessment for income tax deficiency against the Consensus Publishing Company; objection thereto was sustained.

I was assigned in November, 1936, to audit the tax returns of the Consensus Publishing Company for 1933 and 1934. At that time I examined the two cash books covering those two years, the general ledger, the minute book, the stock book, the St. Louis office reports and the cancelled checks and bank statements. When I said stock book, I meant Government's Exhibit 59, the minute book with 284 the stock certificates. This exhibit was in its present condition when I made my examination in 1936. I examined all of the minutes which had been written in this book. When I saw the book it contained minutes for the years 1933 and 1934 and a resolution of the Board for each year authorizing the payment of these commissions to these gentlemen. A dividend is a distribution of earned profit to the stockholders. I did not ask for any further information with reference to those commissions during that examination.

The gross receipts of the Consensus Publishing Company for 1933 were \$119,960.96. The expenses, exclusive of the commissions but including the St. Louis expense, for that year were \$38,789.16. There were payments made and charged to commissions of \$54,537.65. The aggregate of those two figures, commissions and expenses, is \$93,326.81. After the payment of expenses and commissions there was \$26,634.15 remaining out of \$119,960.96.

The gross income for 1934 was \$129,665.78. The expenses, excluding the amounts charged as commissions, were \$40,227.84; commissions, \$60,172.23. The sum of those two figures is \$100,004.07, out of the total of \$129,665.78. Those figures were disclosed by the books and records which I examined in 1936 for 1933 and 1934. I tabulated those expenses on my work sheets separately as expenses and commissions.

Counsel for defendants asked. Did you or did you not recommend any additional taxes for Consensus Publishing Company for 1933 and 1934. Objection thereto was sustained as immaterial.

I did not talk to anybody in the office connected with this company when I made the audit in 1936 for the years 1933 and 1934. I did not ask for any employment contracts, but I asked for all the books and records pertaining to this corporation. I cannot recall at this time that I asked for any information that I did not receive. Nobody refused to submit any records or papers. The 285 employment contracts were referred to in the minutes.

I did not ask for them. I finished that examination in January or February of 1937.

I was assigned to the income tax returns for the subsequent years during the grand jury investigation in the summer of 1939. I was assigned to investigate the income taxes for 1935 and 1936. In 1936 I did not look over the income tax returns of the Consensus Publishing Company for the years 1929 to 1933 at that particular time, but I did later when I got the last assignment to examine the returns from 1929 to 1936. Then I made an examination for all of the years involved, 1929 to 1936. I didn't have to do anything in that examination that I didn't do in the examination of 1933 or 1934. I examined the same books of account as in 1936, but for the entire period. There were additional documents also. I examined the employment contracts at that time. They were among the records submitted to the grand jury under the subpoena. I also made an examination of all the additional documents that had been furnished, including all the correspondence submitted and the Chicago office reports. I have examined everything that has been offered in evidence and there may have been some more.

I examined the individual bank accounts of Arnold W. Kruse, the account carried in the name of Alma A. Kruse, and the account carried in the name of Lester Kruse. I

did not examine Molasky's accounts or Ragen's bank accounts because I did not have them. I examined the bank accounts of Kruse and his son and wife to ascertain what disposition was being made of these payments charged as commissions.

Counsel for defendants asked what was the importance of that with reference to the income tax of the Consensus Publishing Company. The objection by the U. S. Attorney was sustained.

286 Counsel for defendants asked if the witness had any idea they were given to Annenberg. Objection by the U. S. Attorney was sustained.

I started this examination in the early part of June, 1939 as soon as the records were delivered and finished in August of 1939, before the indictment was returned.

No audits of the books of the company and no operating statements were submitted to me for the years 1929 to 1936.

From 1929 to 1936 the disbursements of profits were exactly the same with reference to profits and commissions and were so recorded in the books of the company and returned in each one of the income tax returns as an item of commissions. I did not inquire of anyone connected with the company for any information, either oral or documentary, referring to the payment of commissions that was refused.

Counsel for defendants asked: Have you ever seen in your experience deductions against income of a corporation like the proportion made by the Consensus Publishing Company for expenses and commissions for the years 1929 to 1936. That was objected to as immaterial and the objection sustained.

In arriving at the tax I testified would be due from this company, I assumed that Ragen and his son, Molasky, Kruse and his son, were not entitled to one penny of commissions.

If in the hypothetical question which I answered covering the year 1929 there was included an assumption that the corporation was entitled to deductions of \$10,000.00 for commissions, my answer would be changed.

The witness answered that assuming the corporation were entitled to deductions of \$10,000 for commissions
287 paid then the answers given to the hypothetical questions propounded by the U. S. Attorney would be changed.

Counsel for defendants asked: Has any assessment for income or a deficiency on income been made against the Consensus Publishing Company for income tax for 1929 to 1936 both inclusive. It was objected to as immaterial and the objection sustained.

Molasky came to Mr. Hall's office in this building on May 21, 1940. The indictment was returned in August, 1939, and Molasky was a party to it. Mr. Baron was with him. I don't know how they happened to come there. A call came into the office stating that Mr. Molasky and Mr. Baron wanted to see Mr. Hall. Mr. Baron came in and introduced himself as the personal attorney for Mr. Molasky and told Mr. Hall that they wanted to make certain statements and submit certain documents. We did not ask Mr. Molasky any questions. Mr. Baron said Mr. Molasky wanted to make certain statements and present certain documents and Mr. Hall immediately told Mr. Molasky that any statements he made or any documents that he would submit might be used against him; that under his constitutional rights he did not have to testify or produce anything that would personally incriminate him, but, if he wanted to make any voluntary statements or produce any documents voluntarily, that Mr. Hall felt it was his duty to listen. Mr. Molasky's counsel was present when that statement was made and after that they submitted the photostatic copies of the stock certificates of the Consensus Publishing Company. He also submitted letters and other material I have here in this folder. I have seen the document marked for identification Molasky's Exhibit 2. It was some place among those submitted by Mr. Molasky. It has a government exhibit stamp on it. I have read this letter.

288 The witness examined the work sheets to see if anybody connected with the company had used the word "Dividends" preferable to "commissions". In some instances the witness told Hall in the work sheets, the word "dividend" was used where "commissions" were paid. The letter is from Molasky to the Consensus Publishing Company which states that starting with the first commission in 1933, two separate checks each for one half of the total of commissions should be sent, are payable to Molasky, the other to B. Hoffman.

I examined this letter to see if anybody connected with the company had used the word "dividends" preferable

to "commissions". The papers Mr. Molasky gave us were returned to him several days later.

Cross-Examination by Mr. Struett.

Mr. Struett: Now you examined the income tax for the Consensus Publishing Company from 1929 to 1936, I take it, in connection with your investigation that you have related to Mr. McInerney, is that true?

A. Yes.

Q. And you have a Mr. Tobin and you have a Mr. Salinger working in your office, do you not?

Mr. Hall: I object as immaterial.

The Court: Sustained.

Mr. Struett: I want to show the connection.

The Court: Sustained.

Mr. Struett: And attached to the income tax returns were certain audits made by the government for previous years of the Consensus Publishing Company, yes or no?

Mr. Hall: Objected to.

The Court: That is proper, he may answer.

The Witness: A. I never had those in my possession. I had income tax returns in the name of B. Hoffman. I have seen Government's Exhibit 54.

Cross-Examination by Mr. Baron.

I recall when you and Mr. Molasky came to Mr. Hall's office on May 21, 1940, I attended that conference. At that time Mr. Molasky gave Mr. Hall this document introduced in evidence showing that he pledged thirty shares of the Consensus Publishing Company's stock with M. L. Annenberg on the 30th day of October, 1929. I had a photostat made of it, which is in evidence. At that time he also gave us photostats of the stock certificates for fifteen shares of stock issued by the Consensus Publishing Company to B. Hoffman, dated January 3, 1933, and a photostat of the stock certificate for fifteen shares of stock issued to William Molasky also dated January 3, 1933, and he left those photostats with me. He also at the time gave me a receipt from the Stobie Photo Company showing that he had paid for those photostats on June 21, 1938, also the original contract of sale between himself and Mr. Zweig dated September 29, 1929. At that time he also told me that in 1932

or 1933 he gave a statement to the Mississippi Valley Trust Company stating he owned thirty shares of stock in the Consensus Publishing Company, and allocated a certain valuation to it. He also showed me a series of letters received from Mr. Kamin, Mr. Kruse and Mr. Clark.

Mr. Baron: Now at the same time he also told about a conference that occurred between himself and Mr. Ragen and Mr. Annenberg and Mr. Kruse.

Mr. Hall: I object to that as immaterial.

Mr. McInerney: Read the question.

(Last preceding question read by the reporter.)

Mr. Hall: I object to that.

The Court: He may answer.

The Witness: Yes.

290 Mr. Baron: Q. That he had in 1929 relative amounts to be paid to Molasky, Mr. Ragen and Mr. Kruse?

A. I don't know of a conversation that he had between Mr. Annenberg, Mr. Ragen and Mr. Kruse, and their interest in the Consensus business.

Q. As of the payments that were to be made to them, am I right?

A. Not on payments, but on their interest in the Consensus Publishing Company's business.

Q. That is your recollection of it?

A. Yes, sir.

Cross-Examination by Mr. McInerney.

I made notes of the conversation between Mr. Molasky, Mr. Hall and myself. I did not offer a written statement to Mr. Molasky to sign. He was not asked whether or not he or James Ragen or his son did any work for the Consensus Publishing Company, or whether Kruse or his son did any work for the Consensus Publishing Company.

Redirect Examination by Mr. Hall.

I recall now what Mr. Molasky said in that conversation on May 21, 1940 in Mr. Hall's office about his interest in the company. He said that he owned 30 shares of the stock and that in his conversation or meeting with Mr. Annenberg that they decided to organize the Consensus Publishing Company and that Annenberg was supposed to receive 30 shares and Molasky was to get 30 shares.

291 In my investigation of the Consensus Publishing Company in 1936 I did not see the photostatic copies of the stock certificates which Mr. Molasky produced in the conference referred to, and I did not see the original shares of stock during my investigation in 1939 of the years from 1929 to 1936.

Recross Examination by Mr. McInerney.

At the time of the conversation with Molasky, the government was in possession of the employment contracts, but we did not ask him about them at all.

Redirect Examination by Mr. Hall.

When I said that we had them in our possession, I meant they were impounded. We had access to them.

Recross Examination by Mr. McInerney.

GOVERNMENT EXHIBITS 39 to 44, being the income tax returns of the defendant, James M. Ragen, Jr. were offered and received in evidence. GOVERNMENT EXHIBITS 30 to 37, being the individual income tax returns of defendant, James M. Ragen, for the years 1929 to 1936, both inclusive, were offered in evidence. Counsel for defendant, James M. Ragen, objected thereto as follows:

292 Mr. McInerney: You don't want to put them all in. He left there in 1931.

Mr. Hall: No, it is for the years that the money went to,—or the checks were payable to James M. Ragen, Jr. That would be some time in 1931 to 1936, inclusive. That is the purpose.

Mr. McInerney: Oh, that he might have gotten something from his son?

The Court: They may be received.

Mr. McInerney: I am interested in that, your Honor. If they are offered for that purpose,—this offer now is made of the income tax returns of Ragen, Sr. who left this company and left his employment contract, assigned it to his son some time in 1931. He is now offering his income tax returns for subsequent years and now he says the purpose of it is, as I understood him to say there, that it might show that Ragen, Jr., gave Ragen, Sr., some of his commissions.

Now, I don't see any reason why Ragen's income tax returns should be offered for that purpose. If he has any proof, if it is material, that Ragen, Jr., gave Ragen, Sr., some money, you will have to prove it by other evidence. Now, if there is that item in the income tax return and he can show it to me I will admit it but to put the actual income tax return in and incumbering this record with his personal, private papers that have no connection whatever with this controversy, I do not think that is proper.

293 Mr. Hall: The purpose of these tax returns is this:

We say Arnold Kruse owned the stock, that James M. Ragen owned the stock. The dividends were being paid to them and charged as commission, we claim, for purposes of evasion of the tax of the Consensus Company, on the Consensus income. Then there is a predated assignment from Arnold Kruse to his son and there were checks issued in the name of Mrs. Alma Kruse that were reported in the tax return of Lester Kruse. Lester Kruse's money went into Arnold Kruse's account.

The Court: What about Ragen?

Mr. Hall: All right. We offer these returns to show that it was another step, having Ragen, Jr. report them, another step in the concealment of the income of the defendants Kruse and Ragen in the Consensus Company and a concealment of their ownership of part of the stock.

That is the reason we are offering them.

294 There were offered and received in evidence GOVERNMENT'S EXHIBITS 10 to 18, both inclusive, being the personal income tax returns of the defendant, Arnold W. Kruse, for the years 1929 to 1937, and GOVERNMENT'S EXHIBITS 19 to 25, both inclusive, being the individual income tax returns for the defendant, Lester Kruse, for the years 1932 to 1937 were offered, and GOVERNMENT'S EXHIBITS 26 to 29, both inclusive, being the income tax returns of Alma Kruse for the years 1932 to 1935, inclusive, were offered and received in evidence.

It was stipulated that the Consensus Publishing Company at all times referred to in the indictment and in the evidence was a corporation in good standing and doing business in all of the years.

Thereupon the Government rested.

Which was all the material evidence offered or received in the above entitled cause.

295

**LIST OF GOVERNMENT EXHIBITS
ADMITTED IN EVIDENCE.**

| Govt. Ex. No. | Description |
|---------------|---|
| 1 | Consensus Income Tax Return Year 1929 |
| 2 | Consensus Income Tax Return Year 1930 |
| 3 | Consensus Income Tax Return Year 1931 |
| 4 | Consensus Income Tax Return Year 1932 |
| 5 | Consensus Income Tax Return Year 1933 |
| 6 | Consensus Income Tax Return Year 1934 |
| 7 | Consensus Income Tax Return Year 1935 |
| 8 | Consensus Income Tax Return Year 1936 |
| 9 | Consensus Income Tax Return Year 1937 |
| A 1 | Retained Copy Consensus Income Tax Return —Year 1929 |
| A 2 | Retained Copy Consensus Income Tax Return —Year 1930 |
| A 3 | Retained Copy Consensus Income Tax Return —Year 1931 |
| A 4 | Retained Copy Consensus Income Tax Return —Year 1932 |
| A 5 | Retained Copy Consensus Income Tax Return —Year 1933 |
| A 6 | Retained Copy Consensus Income Tax Return —Year 1934 |
| A 7 | Retained Copy Consensus Income Tax Return —Year 1935 |
| A 8 | Retained Copy Consensus Income Tax Return —Year 1936 |
| A 9 | Retained Copy Consensus Income Tax Return —Year 1937 |
| 296 10 | A. W. Kruse Income Tax Return Year 1929 |
| 11 | A. W. Kruse Income Tax Return Year 1930 |
| 12 | A. W. Kruse Income Tax Return Year 1931 |
| 13 | A. W. Kruse Income Tax Return Year 1932 |
| 14 | A. W. Kruse Income Tax Return Year 1933 |
| 15 | A. W. Kruse Income Tax Return Year 1934 |
| 16 | A. W. Kruse Income Tax Return Year 1935 |
| 17 | A. W. Kruse Income Tax Return Year 1936 |
| 18 | A. W. Kruse Income Tax Return Year 1937 |
| 19 | Lester Kruse Income Tax Return Year 1932 |
| 20 | Lester Kruse Original Tax Return Year 1933 |
| 21 | Lester Kruse Amended Tax Return Year 1933 |
| 22 | Lester Kruse Original Tax Return Year 1934 |

| Govt. Ex. No. | Description |
|---------------|---|
| 23 | Lester Kruse Original Tax Return Year 1935 |
| 24 | Lester Kruse Original Tax Return Year 1936 |
| 25 | Lester Kruse Original Tax Return Year 1937 |
| 26 | Alma Kruse Original Tax Return Year 1932 |
| 27 | Alma Kruse Original Tax Return Year 1933 |
| 27-A | Alma Kruse Amended Tax Return Year 1933 |
| 297 28 | Alma Kruse Original Tax Return Year 1934 |
| 29 | Alma Kruse Original Tax Return Year 1935 |
| 30 | James H. Ragen Original Return Year 1929 |
| 31 | James M. Ragen Original Return Year 1930 |
| 32 | James M. Ragen Original Return Year 1931 |
| 33 | James M. Ragen Original Return Year 1932 |
| 34 | James M. Ragen Original Return Year 1933 |
| 35 | James M. Ragen Original Return Year 1934 |
| 36 | James M. Ragen Original Return Year 1935 |
| 37 | James M. Ragen Original Tax Return Year 1936 |
| 38 | James M. Ragen Original Tax Return Year 1937 |
| 39 | James M. Ragen, Jr. Original Tax Return— Year 1931 |
| 40 | James M. Ragen, Jr. Original Tax Return— Year 1932 |
| 41 | James M. Ragen, Jr. Original Tax Return— Year 1933 |
| 42 | James M. Ragen, Jr. Original Tax Return— Year 1934 |
| 43 | James M. Ragen, Jr. Original Tax Return— Year 1935 |
| 44 | James M. Ragen, Jr. Original Tax Return— Year 1936 |
| 46 | William Molasky Original Tax Return Year 1929 |
| 47 | William Molasky Original Tax Return Year 1930 |
| 48 | William Molasky Original Tax Return Year 1931 |
| 49 | William Molasky Original Tax Return Year 1932 |
| 298 50 | William Molasky Original Tax Return—Year 1933 |
| 51 | William Molasky Original Tax Return—Year 1934 |
| 52 | William Molasky Original Tax Return—Year 1935 |

| Govt. Ex. No. | Description |
|---------------|---|
| 53 | William Molasky Original Tax Return—Year 1936 |
| 54 | William Molasky Original Tax Return—Year 1937 |
| 54-A | William Molasky Information Return—Year 1937 |
| 55 | B. Hoffman Original Tax Return Year 1936 |
| 56 | B. Hoffman Original Tax Return Year 1935 |
| 57 | B. Hoffman Original Tax Return Year 1934 |
| 58 | B. Hoffman Original Tax Return Year 1933 |
| 59 | Consensus Minute Book and Stock Certificate Book |
| 60 | Memo. of agreement between M. L. Annenberg and Molasky |
| 63 | Contract of Sale Molasky & Zweig |
| 64 | Run-Down Sheet of Consensus Pub. Co. dated March 4, 1938 |
| 65 | Articles of Co-partnership |
| 66 | Supplemental co-partnership agreement |
| 67 | Articles of Incorporation |
| 70 | Letter dated January 1, 1934, Molasky to Matheis |
| 73 | Letter dated December 21, 1933, Molasky from Matheis |
| 75 | Employment Contract between Consensus Pub. Co. and William Molasky 1930 |
| 76 | Employment Contract between Consensus Pub. Co. and A. W. Kruse 1930 |
| 299 77 | Employment Contract between Consensus Pub. Co. and J. M. Ragen 1930 |
| 78 | Employment Contract between Consensus Pub. Co. and William Molasky 1931 |
| 79 | Employment Contract between Consensus Pub. Co. and J. M. Ragen 1931 |
| 80 | Assignment from J. M. Ragen to James M. Ragen, Jr. |
| 81 | Employment Contract between Consensus Pub. Co. and A. W. Kruse 1931 |
| 82 | Employment Contract between Consensus Pub. Co. and William Molasky 1932 |
| 83 | Assignment from A. W. Kruse to Lester Kruse |
| 84 | Employment Contract between Consensus Pub. Co. and James M. Ragen 1932 |

| Govt. Ex. No. | Description |
|---------------|---|
| 85 | Employment Contract between Consensus Pub. Co. and William Molasky 1932 |
| 86 | Employment Contract between Consensus Pub. Co. and William Molasky 1933 |
| 87 | Employment Contract between Consensus Pub. Co. and James M. Ragen, Jr. 1933 |
| 88 | Employment Contract between Consensus Pub. Co. and Lester Kruse 1933 |
| 89 | Employment Contract between Consensus Pub. Co. and William Molasky 1934 |
| 90 | Employment Contract between Consensus Pub. Co. and Lester A. Kruse 1934 |
| 91 | Employment Contract between Consensus Pub. Co. and James M. Ragen 1934 |
| 300 92 | Employment Contract between Consensus Pub. Co. and William Molasky 1935 |
| 93 | Employment Contract between Consensus Pub. Co. and James M. Ragen 1935 |
| 94 | Employment Contract between Consensus Pub. Co. and Lester A. Kruse 1935 |
| 95 | Employment Contract between Consensus Pub. Co. and William Molasky 1936 |
| 96 | Employment Contract between Consensus Pub. Co. and Lester A. Kruse 1936 |
| 97 | Employment Contract between Consensus Pub. Co. and James M. Ragen, Jr. 1936 |
| 98 | Employment Contract between Consensus Pub. Co. and William Molasky 1937 |
| 99 | Employment Contract between Consensus Pub. Co. and James M. Ragen, Jr. 1937 |
| 100 | Employment Contract between Consensus Pub. Co. and A. W. Kruse 1937 |
| 101 | Employment Contract between Consensus Pub. Co. and A. W. Kruse 1938 |
| 102 | Guarantee by Cecelia Co. to A. W. Kruse 1938 |
| 103 | Employment Contract between Consensus Pub. Co. and James M. Ragen, Jr. 1938 |
| 104 | Guarantee by Cecelia Co. to James M. Ragen 1938 |
| 105 | Employment Contract between Consensus Pub. Co. and William Molasky 1938 |
| 106 | Guarantee by Cecelia Co. to William Molasky 1938 |

Govt. Ex. No. Description

- | | |
|----------------------------|---|
| 107 | Photostat Copy of Stock Certificate to W. Molasky |
| 301 | |
| 108 | Photostat Copy of Stock Certificate to B. Hoffman |
| 109 | Photostat Copy of letter to Wm. Molasky from A. W. Kruse 10/1/29 |
| 115 | Telegram to J. E. Hafner from A. W. Kruse 1/6/37 |
| 119 | Original letter from Molasky to Kruse 1/6/33 |
| 120 | Original letter from Molasky to Kruse 2/14/33 |
| | Vault List |
| | Vault List |
| | Vault List |
| | Vault List |
| 200 | Photostat Copy of Letter dated 8/27/34 from H. Kamin to Wm. Molasky |
| 201 | Photostat Copy of Letter dated 4/9/35 from H. S. Kamin to Mr. Molasky. |
| 205 | Signature Card of Consensus Pub. Co. Acct. in Mississippi Valley Trust Co. |
| 206 | Resolution dated 1929 for withdrawals from Consensus Pub. Co. Acct. |
| 207 | Signature Card for Consensus Pub. Co. at Mississippi Valley Trust Co. |
| 208 | Letter from Consensus Pub. Co. to bank |
| 209 | Resolution of Consensus Pub. Co. regarding check withdrawals |
| 210 | Resolution dated 4/5/35 for withdrawals from Consensus Pub. Co. Acct. at Mississippi Valley Trust Co. |
| 31 W. R. 1 to 31 W. R. 104 | Weekly Reports |
| 32 W. R. 1 to 32 W. R. 103 | Weekly Reports |
| 33 W. R. 1 to 33 W. R. 103 | Weekly Reports |
| 302 | |
| 34 W. R. 1 to 34 W. R. 104 | Weekly Reports |
| 35 W. R. 1 to 35 W. R. 104 | Weekly Reports |
| 36 W. R. 1 to 36 W. R. 106 | Weekly Reports |
| 37 W. R. 1 to 37 W. R. 104 | Weekly Reports |

| Govt. Ex. No. | Description |
|----------------------------|---|
| W. P. 1 to W. P. 13 | Consensus Publishing Co. Work Papers |
| W. P. 13 to W. P. 18 | Consensus Publishing Co. Work Papers |
| W. P. 18 to W. P. 26 | Consensus Publishing Co. Work Papers |
| W. P. 26 to W. P. 28 | Consensus Publishing Co. Work Papers |
| W. P. 28 to W. P. 29 | Consensus Publishing Co. Work Papers |
| W. P. 30 to W. P. 34 | Consensus Publishing Co. Work Papers |
| W. M. 1 to W. M. 167 | Consensus Publishing Co. cancelled checks payable to Wm. Molasky |
| J. M. 1 to J. M. 59 | Consensus Publishing Co. cancelled checks payable to J. M. Ragen, Sr. |
| J. M. J. 1 to J. M. J. 109 | Consensus Publishing Co. cancelled checks payable to J. M. Ragen, Jr. |

303

| | |
|------------------------|---|
| A. W. 1 to A. W. 13 | Consensus Publishing Co. cancelled checks payable to A. W. Kruse |
| A. W. 12 to A. W. 19 | Consensus Publishing Co. cancelled checks payable to A. W. Kruse |
| A. W. 21 to A. W. 39 | Consensus Publishing Co. cancelled checks payable to A. W. Kruse |
| A. W. 115 to A. W. 122 | Consensus Publishing Co. cancelled checks payable to A. W. Kruse |
| A. W. 123 to A. W. 132 | Consensus Publishing Co. cancelled checks payable to A. W. Kruse |
| A. W. 40 to A. W. 114 | Consensus Publishing Co. cancelled checks payable to A. W. Kruse |
| A. K. 1 to A. K. 30 | Consensus Publishing Co. cancelled checks payable to Mrs. A. W. Kruse |
| L. K. 1 to L. K. 7 | Consensus Publishing Co. cancelled checks payable to Lester Kruse |
| B. H. 1 to B. H. 16 | Consensus Publishing Co. cancelled checks payable to B. Hoffman |
| C. 1 to C. 169 | Consensus Publishing Co. cancelled checks payable to Cecelia Investment Co. |
| W. M. 168 to W. M. 231 | Consensus Publishing Co. cancelled checks payable to Wm. Molasky |

Govt. Ex. No. Description

- B. H. 17 to B. H. 81 Consensus Publishing Co. cancelled checks payable to B. Hoffman
- J. M. J. 110 to J. M. J. 182 Consensus Publishing Co. cancelled checks payable to James M. Ragen, Jr.
- L. K. 8 to L. K. 71 Consensus Publishing Co. cancelled checks payable to Lester Kruse
- C. 170 to C. 231 Consensus Publishing Co. cancelled checks payable to Cecelia Investment Co.
- 304
- W. M. 232 to W. M. 322 Consensus Publishing Co. cancelled checks payable to William Molasky
- B. H. 82 to B. H. 169 Consensus Publishing Co. cancelled checks payable to B. Hoffman
- J. M. J. 183 to J. M. J. 271 Consensus Publishing Co. cancelled checks payable to J. M. Ragen, Jr.
- L. K. 72 to L. K. 160 Consensus Publishing Co. cancelled checks payable to Lester Kruse
- C. 232 to C. 322 Consensus Publishing Co. cancelled checks payable to Cecelia Investment Co.
- W. M. 323 to W. M. 342 Consensus Publishing Co. cancelled checks payable to Wm. Molasky
- B. H. 170 to B. H. 189 Consensus Publishing Co. cancelled checks payable to B. Hoffman
- L. K. 161 to L. K. 180 Consensus Publishing Co. cancelled checks payable to Lester Kruse
- J. M. J. 272 to J. M. J. 291 Consensus Publishing Co. cancelled checks payable to J. M. Ragen, Jr.
- C. 323 to C. 342 Consensus Publishing Co. cancelled checks payable to Cecelia Investment Co.
- W. M. 343 to W. M. 456 Consensus Publishing Co. cancelled checks payable to Wm. Molasky
- B. H. 190 to B. H. 205 Consensus Publishing Co. cancelled checks payable to B. Hoffman
- A. W. 133 to A. W. 180 Consensus Publishing Co. cancelled checks payable to A. W. Kruse
- L. K. 181 to L. K. 196 Consensus Publishing Co. cancelled checks payable to Lester Kruse
- J. M. J. 292 to J. M. J. 355 Consensus Publishing Co. cancelled checks payable to James M. Ragen, Jr.
- C. 343 to C. 406 Consensus Publishing Co. cancelled checks payable to Cecelia Investment Co.

Govt. Ex. No. Description

305

- 29 C. R. 1 to 29 C. R. 14 Chicago Office Weekly Reports
to Stockholders
- 30 C. R. 1 to 30 C. R. 50 Chicago Office Weekly Reports
to Stockholders
- 31 C. R. 1 to 31 C. R. 52 Chicago Office Weekly Reports
to Stockholders
- 32 C. R. 1 to 32 C. R. 52 Chicago Office Weekly Reports
to Stockholders
- 33 C. R. 1 to 33 C. R. 51 Chicago Office Weekly Reports
to Stockholders
- 34 C. R. 1 to 34 C. R. 52 Chicago Office Weekly Reports
to Stockholders
- 35 C. R. 1 to 35 C. R. 52 Chicago Office Weekly Reports
to Stockholders
- 36 C. R. 1 to 36 C. R. 53 Chicago Office Weekly Reports
to Stockholders
- 37 C. R. 1 to 37 C. R. 52 Chicago Office Weekly Reports
to Stockholders
- J. 1 Journal Pages 1 to 50
Journal Pages 51 to 65
Journal Pages 66 to 88
Journal Pages 89 to 91
Journal Pages 92 to 98
- C.B. 1 Cash Book Pages 1 to 45
Cash Book Pages 46 to 74
- C.B. 2 Cash Book Pages 1 to 13
Cash Book Pages 14 to 19
Cash Book Pages 20 to 59
- G.L. General Ledger

306 EXHIBITS OF FIRST NATIONAL BANK
OF CHICAGO, CHICAGO, ILLINOIS:

- FN 1 Signature Card A. W. Kruse Spec. a/c #973,655
- FN 2 Signature Card Arnold W. Kruse & Lester A.
Kruse a/c #973,655
- FN 4 Ledger Sheet Arnold W. Kruse a/c #737,109,
Sept. 25, 1930 to Jan. 4, 1932
- FN 5 Ledger Sheet Arnold W. Kruse a/c #737,109,
Jan. 8, 1932 to Jan. 14, 1933

| Govt. Ex. No. | Description | | |
|---------------|-----------------------------|--|--|
| FN 6 | Ledger Sheet | Arnold W. Kruse a/c #737,109, | |
| | | Jan. 16, 1933 to Apr. 30, 1934 | |
| FN 7 | Ledger Sheet | Arnold W. Kruse a/c #737,109, | |
| | | May 7, 1934 to Jan. 1, 1940 | |
| FN 8 | Ledger Sheet | Arnold W. Kruse Spec. a/c | |
| | | #973,655, Nov. 19, 1932 to Feb. 14, 1934 | |
| FN 9 | Ledger Sheet | Arnold W. Kruse Spec. a/c | |
| | | #973,655, Feb. 19, 1934 to Jan. 1, 1940 | |
| FB 1 | Signature Card | Consensus Publishing Co. | |
| FB 2 | Ledger Sheets | Consensus Publishing Co. Oct. | |
| | | 25, 1929 to Apr. 10, 1935 | |
| FB 3 | Ledger Sheets | Arnold W. Kruse Checking Acct., | |
| | | Dec. 31, 1927 to Apr. 30, 1934 | |
| FB 4 | Ledger Sheets | Arnold W. Kruse Checking Ac- | |
| | | count, May 5, 1935 to Jan. 31, 1939 | |
| FB 5 | Ledger Sheets | Arnold W. Kruse Checking Ac- | |
| | | count, Feb. 1, 1939 to Apr. 30, 1940 | |
| FB 6 | Signature Card | Arnold W. Kruse Checking | |
| | | Account | |
| FB 7 | Photostat of Signature Card | Arnold W. Kruse | |
| | | a/c #737,109 | |
| FB 8 | Withdrawal Order | Arnold W. Kruse a/c | |
| | | #737,109 | |
| FB 9 | Withdrawal Order | Arnold W. Kruse a/c | |
| | | #737,109 | |
| 307 | | | |
| FB 10 | Withdrawal Order | Arnold W. Kruse a/c | |
| | | #737,109 | |
| FB 11 | Withdrawal Order | Arnold W. Kruse a/c | |
| | | #737,109 | |
| FB 12 | Withdrawal Order | Arnold W. Kruse a/c | |
| | | #737,109 | |
| FB 13 | Withdrawal Order | Arnold W. Kruse a/c | |
| | | #737,109 | |
| FB 14 | Withdrawal Order | Arnold W. Kruse a/c | |
| | | #737,109 | |
| FB 15 | Withdrawal Order | Arnold W. Kruse a/c | |
| | | #737,109 | |
| FB 16 | Withdrawal Order | Arnold W. Kruse a/c | |
| | | #737,109 | |
| FB 17 | Withdrawal Order | Arnold W. Kruse a/c | |
| | | #737,109 | |

Govt. Ex. No. Description

- FB 18 Ledger Sheets Lester Kruse Checking Account,
Nov. 29, 1934 to Apr. 30, 1940
- FB 20 Signature Card Lester Kruse Checking Account
- FN 22 X Resolution authorizing withdrawals from Con-
sensus Publishing Co. Acct.
- TF 92 to TF 362 Deposit tickets Consensus Publishing
Co. commercial account from Oct. 25, 1929 to
Nov. 27, 1934
- AWF 1 to AWF 751 Deposit tickets for A. W. Kruse
account from Jan. 7, 1928 to Dec. 31, 1937
- AWS 1 to AWS 95 Deposit tickets for A. W. Kruse ac-
count \$737,109
- AK 1 to AK 30 Checks from Consensus Publishing Co.
Deposited in Kruse savings acct.
- AK 1 X to AK 29 X Deposit tickets showing deposits in
Kruse Acct. \$973,655
- AW 12 X to AW 37 X Deposit tickets for checks deposited
in Kruse savings acct.
- AW 115 X to AW 122 X Deposit tickets for checks de-
posited in Kruse savings acct.
- AW 12 to AW 19 Checks deposited in savings acct.
- AW 21 to AW 39 Checks deposited in savings acct.
- AW 115 to AW 122 Checks deposited in savings acct.
- 308
- LK 1 X to LK 86 X Deposit tickets for Kruse Acct.
\$973,655
- LF 87 X to LK 196 X Deposit tickets for Lester Kruse
checking acct.
- LKF 1 to LKF 56 Deposit tickets for Lester Kruse check-
ing acct. from Dec. 4, 1934 to Dec. 31, 1937
Stipulation that checks of Consensus deposited
in A. W. Kruse acct. were in fact so deposited
Stipulation that checks drawn against Consen-
sus acct. were drawn against acct. to which
records of bank relate
- 109-308 to 109-532 Cancelled checks of A. W. Kruse acct.
in First National Bank for 1933
- 109-533 to 109-776 Cancelled checks of A. W. Kruse for
1934
- 109-777 to 109-1013 Cancelled checks of Kruse for 1935
- 109-1014 to 109-1183 Cancelled checks of Kruse for 1936
- 113-108 to 113-180 Cancelled checks and debit memo, for
Lester Kruse acct. (1934, 1935, 1936)

EXHIBITS OF MISSISSIPPI VALLEY TRUST
COMPANY, ST. LOUIS, MISSOURI:

| Govt. Ex. No. | Description |
|---------------|---|
| MV 1 | Signature Card of Consensus Publishing Co. |
| MV 2 | Ledger Sheet Consensus Publishing Co. Oct. 22, 1929 to Dec. 31, 1929 |
| MV 3 | Ledger Sheet Consensus Publishing Co. Jan. 2, 1930 to Apr. 9, 1930 |
| MV 4 | Ledger Sheet Consensus Publishing Co. Apr. 10, 1930 to July 18, 1930 |
| MV 5 | Ledger Sheet Consensus Publishing Co. July 19, 1930 to Oct. 29, 1930 |
| MV 6 | Ledger Sheet Consensus Publishing Co. Oct. 30, 1930 to Dec. 31, 1930 |
| 309 | |
| MV 7 | Ledger Sheet Consensus Publishing Co. Jan. 5, 1931 to Apr. 23, 1931 |
| MV 8 | Ledger Sheet Consensus Publishing Co. Apr. 24, 1931 to Aug. 8, 1931 |
| MV 9 | Ledger Sheet Consensus Publishing Co. Aug. 10, 1931 to Nov. 12, 1931 |
| MV 10 | Ledger Sheet Consensus Publishing Co. Nov. 13, 1931 to Dec. 31, 1931 |
| MV 11 | Ledger Sheet Consensus Publishing Co. Jan. 4, 1932 to Apr. 12, 1932 |
| MV 12 | Ledger Sheet Consensus Publishing Co. Apr. 13, 1932 to July 26, 1932 |
| MV 13 | Ledger Sheet Consensus Publishing Co. July 27, 1932 to Nov. 12, 1932 |
| MV 14 | Ledger Sheet Consensus Publishing Co. Nov. 14, 1932 to Dec. 31, 1932 |
| MV 15 | Ledger Sheet Consensus Publishing Co. Jan. 3, 1933 to May 6, 1933 |
| MV 16 | Ledger Sheet Consensus Publishing Co. May 8, 1933 to Aug. 21, 1933 |
| MV 17 | Ledger Sheet Consensus Publishing Co. Aug. 22, 1933 to Nov. 21, 1933 |
| MV 18 | Ledger Sheet Consensus Publishing Co. Nov. 22, 1933 to Dec. 30, 1933 |
| MV 19 | Ledger Sheet Consensus Publishing Co. Jan. 2, 1934 to Apr. 18, 1934 |
| MV 20 | Ledger Sheet Consensus Publishing Co. Apr. 19, 1934 to Sept. 1, 1934 |

| Govt. Ex. No. | Description |
|---------------|---|
| MV 21 | Ledger Sheet Consensus Publishing Co. Sept. 4, 1934 to Dec. 31, 1934 |
| MV 22 | Ledger Sheet Consensus Publishing Co. Jan. 1, 1935 to Mar. 25, 1935 |
| MV 23 | Ledger Sheet Consensus Publishing Co. Mar. 26, 1935 to June 15, 1935 |
| MV 24 | Ledger Sheet Consensus Publishing Co. June 17, 1935 to Sept. 13, 1935 |
| MV 25 | Ledger Sheet Consensus Publishing Co. Sept. 16, 1935 to Dec. 14, 1935 |
| MV 26 | Ledger Sheet Consensus Publishing Co. Dec. 16, 1935 to Dec. 31, 1935 |

316

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|----------|---|
| MV 27 | Ledger Sheet Consensus Publishing Co. Jan. 2, 1936 to April 4, 1936 |
| MV 28 | Ledger Sheet Consensus Publishing Co. Apr. 6, 1936 to June 27, 1936 |
| MV 29 | Ledger Sheet Consensus Publishing Co. June 29, 1936 to Sept. 25, 1936 |
| MV 30 | Ledger Sheet Consensus Publishing Co. Sept. 26, 1936 to Dec. 31, 1936 |
| MV 31 to | Ledger Sheets' Consensus Publishing Co. Jan. 2, 1937 to Dec. 29, 1938 |
| MV 39 | |
| MV 40 | Ledger Sheet Consensus Publishing Co. Nov. 26, 1928 to Nov. 26, 1928 |
| MV 41 to | Deposit tickets for Consensus Publishing Co. during period Oct. 22, 1929 to Dec. 31, 1937 |
| MV 2004 | |
| MVL 1 | Liability loan ledger Consensus Publishing Co. Jan. 1, 1929 to Apr. 9, 1931 |
| WM 3000 | Signature Card of William Molasky July 7, 1931 |
| WM 3002 | Signature Card of William Molasky and Mrs. Dorothy Molasky September 29, 1930 |
| WM 3003 | Signature Card of William Molasky by Mrs. William Molasky, Attorney in Fact |
| WM 3005 | Signature Card of William Molasky by Mrs. Dorothy Molasky July 7, 1931 |
| WM 3006 | Signature Card of William Molasky by Gordon Brooks, Attorney in Fact, July 21, 1938 |
| WM 3007 | Signature Card of William Molasky by Harold Becker, Attorney in Fact |
| MVC 1 | Credit file of Consensus Publishing Co. |

| Gert. Ex. No. | Description |
|---------------|--|
| MVC 4 | Copy of Resolutions signed by H. S. Kamin and Wm. Molasky to Mississippi Valley Trust Co. May 20, 1936 |
| MVC 6 K | Credit statement of Wm. Molasky February 18, 1933 |
| MVC 6 R | |
| MVC 6 J | Credit statement of Wm. Molasky |
| MVC 6 AS | Credit Memorandum of Wm. Molasky |
| MVS 1 to | Ledger Sheets of William Molasky Acct. |
| MVS 72 | |

311

| | |
|-------------|--|
| WM 40 X to | Deposit tickets for Wm. Molasky Acct. |
| WM 151 X | |
| WM 152 X to | Deposit tickets for Wm. Molasky Acct. |
| WM 217 X | |
| WM 218 X to | } Additional deposit tickets for William Molasky Acct. |
| WM 253 X | |
| WM 254 X to | |
| WM 305 X | |
| WM 306 X to | |
| WM 358 X | |
| WM 359 X to | |
| WM 406 X | |

312 Mr. McInerney: Your Honor, we will present motions for a directed verdict. We would like to have an opportunity to argue them.

The Court: What are the motions?

Mr. McInerney: Well, the motions include a motion to dismiss the indictment. I am convinced at least on the conspiracy count that even if there is any proof that they did not work there is a complete variance from the allegations in that count. Of course, there isn't a line in this record that Ragen has ever owned any stock in that company.

The Court: I think there is evidence about that.

Mr. McInerney: Well, they couldn't receive dividends if they didn't own any stock.

Mr. Hall: If the court please, there is an exhibit—

Mr. McInerney: I won't argue it if your Honor does not want me to, if your Honor does not want to hear the argument.

The Court: I have followed the case carefully as the case has progressed and I think it is my absolute duty to overrule any motion for a directed verdict or to dismiss the

indictment on the ground that there isn't any substantial evidence or on the ground that there is a variance.

Mr. McInerney: Well, of course, back of all that, your Honor, there is this: I tried to mention it in my objection to the hypothetical question. I am convinced that according to the proof that somebody received commissions, that merely because they happen to own stock is not sufficient to constitute a crime.

The Court: Well, I feel that it makes it a question of fact for the jury.

313 Mr. McInerney: The trouble with that is then we get to the question of when does a man know he is committing a crime? Now, directors of a corporation, merely because a man owns stock, that does not mean he cannot collect salary. The courts have passed on it that if it is not a sham, if it is a bonafide contract, then the fact that they have stock does not make any difference.

The Court: Well, anything that is done with intent, and whether there is that forbidden intent, whether there is that forbidden thing—

Mr. McInerney: It is a question of law on the facts here.

The Court: No.

Mr. McInerney: There is no controversy. There isn't a controverted fact in this case up until now. You couldn't sustain a civil case on this evidence for a deficiency tax. If you ever did it would be—it have to be for \$77,000 on this record.

The Court: I think they could.

Mr. McInerney: In a civil case the mere fact that they were stockholders and received money?

The Court: Well, there is more than that here. There are discrepancies in the record. In some places it is dividends; in some places it is commissions. You have got letters where they refer to them in some places as dividends and in some places as commissions. There is present a confusion in somebody's mind. Whether that was intentional and willful, I don't know; that is for the jury
314 to decide, but there is enough evidence in here that they did not even know themselves what they were doing.

Mr. McInerney: Exactly that; then they could not be guilty of a crime.

The Court: Yes.

Mr. McInerney: Why, no, if they didn't know what they were doing.

The Court: Then the question for the jury is whether it was pure ignorance or whether it was intentional.
315 Thereupon, the defendants, James M. Ragen, James M. Ragen, Jr., William Molasky, Arnold W. Kruse and Lester A. Kruse, made written motions to dismiss the indictment and for directed verdicts, in words and figures as follows:

Said motions to dismiss the indictment and for directed verdicts appear on pages 230-236 of the Printed Record.
331 The next morning the court stated:

The Court: Gentlemen, I want to make this statement before we proceed: It occurred to me last night that perhaps I had been a little bit indiscreet in curtailing the argument. I spent the evening with a certain Judge discussing District courts and courts of appeal and I would feel better satisfied in my mind if I would permit counsel to present their argument if they desire to do so. Certainly I would not want them to be in a position to say that I had denied them an opportunity for oral argument.

332 The Court: Mr. Hall, let me ask you this question: Does this evidence show that the defendants did not earn any salaries?

Mr. Hall: That question is not involved, if the court please.

The Court: I wish you would set me right on it.

Mr. Hall: The question of what these defendants earned is not involved in this case.

The Court: Well, if they earned these commissions they were entitled to them.

Mr. Hall: The evidence shows, if the court please, on the Government's theory, and it tends to prove it, that these commissions, the charge of commissions was used as a subterfuge to distribute the 70 per cent of the company's net income to the stockholders. Now, I don't care, it doesn't matter under the cases, if it was a subterfuge used for that purpose and there was no agreement for the payment of services or for services rendered to the corporation, whether they performed any services at all or not, if those were dividends they were dividends.

333 The Court: Well, Mr. Hall, suppose I were an investigator for the Internal Revenue Department.

Mr. Hall: Yes, sir.

The Court: And I was confronted with the facts as they appear thus far in this record?

Mr. Hall: Yes, sir.

The Court: I was investigating the income of the Consensus Publishing Company, or I am the Judge in a civil case and I am hearing the evidence and the question is what were these sums? Were they declarations of dividends from the profits of the company, which are not deductible from the income of the corporation, or were they commissions paid in the form of salaries for some kind of labor? Were they unreasonable amounts paid for some kind of labor? Were they so extraordinary in their amounts as to indicate some fraudulent intent or bad faith? Were the sums received so out of proportion to the services rendered that it becomes a question of fact as to whether those sums were reasonably earned?

In other words, were they so disproportionate as to create a jury question of whether there was a fraudulent intent?

Now, haven't I as a Trial Judge or an investigator, in determining exactly the facts in this case, the ultimate fact, haven't I got to take into consideration the circumstances that bear upon those particular questions of fact? Haven't I got to satisfy myself as a trial judge in a civil suit of those things, of whether they did render services and of whether those services were proportionate to the compensation, alleged compensation received? Aren't those questions in this case?

334 Mr. Hall: If the court please, you put a matter of a civil case. I will let Mr. Ziffren answer it.

Mr. Ziffren: If I may answer that, your Honor, I respectfully submit that Mr. McInerney, if I may be so bold as to speak of distinguished counsel, has confused the issue by injecting a civil case in this case, your Honor and—

The Court: Don't inject it. Isn't it in this case?

Mr. Ziffren: No, it is not, your Honor.

The Court: Hasn't the jury got to determine that?

Mr. Ziffren: No, I respectfully submit that in this—

The Court: Suppose the jury were passing upon how much tax does the Consensus Company owe?

Mr. Ziffren: Your Honor, I respectfully submit that in

a civil case the jury or the Judge would be trying to decide what was reasonable compensation but in a criminal case we are not concerned with whether—

The Court: Well, this jury has got to say, first of all, that the income taxes of the Consensus Company haven't been paid.

Mr. Ziffren: Quite right, your Honor.

The Court: Yes, that is the first essential.

Mr. Ziffren: That is right, your Honor.

The Court: That there is a deficiency in income taxes.

Mr. Ziffren: That is right, but, your Honor, the jury does not have to say whether that deficiency is \$77,000 or \$10,000.

335 The Court: No, no, no.

Mr. Ziffren: Now, your Honor, for that reason I say that the issue has become confused. In a civil case the whole question—

The Court: In a civil case we have the very same issue first. The very first issue that the court has to decide in a civil suit is this: Is there a shortage in income taxes? Without reference to its amount, is the method of accounting wrong, has there been a failure to pay the tax which was due? Now, that question is in both cases, in a civil suit as well as in this.

Mr. Ziffren: Yes, sir.

The Court: Now, of course, in a civil suit, I also have to determine how much that deficiency is, I have got to go ahead and determine it. In a criminal case, of course, there is no such question. There the jury must decide whether there is a deficiency in income taxes and then if it decides there is, then it has got the further question, which is not in a civil case, was that shortage due to the acts of the defendants complained of as alleged in this indictment?

Mr. Ziffren: We agree entirely with that, your Honor. And may I point out that the issue in this case, without doubt, the admitted issue in this case is simply whether or not these defendants did wilfully attempt to evade taxes—

The Court: Absolutely.

Mr. Ziffren: By this device of reporting as commissions amounts that were in fact dividends.

336 Now, your Honor, as you pointed out, the first question and the only question that is involved in a civil case that is common to this case is the question whether some tax is due that was not paid. Now, on that question

we respectfully submit that the evidence is sufficient to go to the jury. On the second question, did these people earn every dime of that income, we respectfully submit that is not involved here. We only say that there is enough evidence in this case to go to jury on the question so that the jury can decide the question whether or not these defendants did wilfully attempt to evade these taxes by reporting 70 per cent of the income of this corporation as commissions rather than dividends.

Now, on the question as to whether or not they were really commissions, Mr. McInerney admitted this morning that these contracts had been assigned back and forth. That certainly is a circumstance for the jury to consider, whether a young man like Lester Kruse or Mrs. A. W. Kruse, whether if the services by Arnold Kruse were so valuable to the corporation, that the corporation would agree to take the services of his wife instead of the services of a young man.

The Court: Of course, any man may give away whatever he wants to.

Mr. Ziffren: But, your Honor, he cannot assign his own income.

Mr. Hall: He cannot assign a contract for personal services.

The Court: He can assign it but he may have to pay a tax on it just the same.

337 Mr. Ziffren: That is right.

The Court: He can assign it but he may have to pay a tax on it just the same.

Mr. Ziffren: That is right.

The Court: But he can always assign it.

Mr. Ziffren: That is right, your Honor.

The Court: But he still has to pay a tax on it.

Mr. Ziffren: That is right, but isn't that a circumstance to consider, as to whether or not the corporation was getting the services of A. W. Kruse?

The Court: Personally, I do not attach much significance to that. If I have a bond or a certificate of stock, I can give it to my wife if I want to, I have a right to give away anything I want.

Mr. Hall: That is not what they gave.

The Court: And if I have a contract for a share of partnership profits, if I am a partner in a firm and I am entitled to fifty per cent of the profits, and we have a

written contract, I have a right to assign that income to my wife.

Mr. Hall: That is not what they gave, your Honor.

The Court: Now, they turn around and assign—we can just as well face the fact—they have assigned a written contract of employment.

Mr. Hall: Yes.

The Court: They have a perfect right to do that.

Mr. Hall: Not in 1936.

The Court: Oh, yes, they have a right to do it at any time.

338 Mr. Hall: And date them back?

The Court: Yes, if there is no fraudulent intent. You can go back and date it ten years if thereby you defraud nobody. You can change your name, you can do business under any name you want to so long as you defraud nobody.

Mr. Hall: So long as you do not attempt to evade paying income taxes.

The Court: You can do anything so long as you do not violate the law.

Mr. Hall: So long as you do not violate the law, yes.

The Court: Have you finished your discussion about that?

Mr. Hall: Well, I wanted to add something, if the court please.

The Court: Of course, this jury does not have to decide how much, if any, these defendants earned. I think Mr. McInerney's position on that is not right. But if the evidence shows that the defendants were rendering services and did earn something, then to the extent that they were earned they were properly payable as salaries or commissions or whatever you may call them.

But now, your answer to that, of course, is, "We don't have to show how much they earned." Does that follow? In other words, once having shown,—and this evidence does show,—that they rendered,—some of them, at least, and perhaps all of them, perhaps all of them,—that they rendered some services: Now, having shown that they rendered some services and that they received these things as commissions, haven't you got to go further and show, in order to create a fraudulent intent, that these commissions received were all out of proportion to the services rendered?

339

Mr. Ziffren: Your Honor, might I answer that first

by pointing out that counsel will admit, I am sure, as your Honor will admit, that there is nothing to prevent a stockholder from rendering services and services that he is not being paid for.

The Court: No, but he is under no obligation to do that.

Mr. Ziffren: He is under no obligation to.

The Court: No.

(Further argument by Mr. Ziffren.)

Mr. Ziffren: So that the fact that Mr. Ragen, as general manager of the Nationwide News Service, might have helped the Consensus Publishing Company or the fact that Lester Kruse might have answered telephone calls does not mean that they were acting as employees. They may have been acting as stockholders.

That gets us down, then, to this question: If the Government agents,—if there is evidence in the record to show that the seventy per cent commissions that were paid constituted such a deduction of the income tax that the Consensus Publishing Company did not pay as large a tax as it should have paid, that excessive deduction was made in some amount, then we submit that that disposes of any similarity to a civil case and then the jury must take all these other facts and decide whether there is in the record sufficient facts so that they can say that this failure to pay income taxes was due to a willful intent.

Now, your Honor, I would like to point out, in response to Mr. McInerney's citation of cases, that, first of all, his statement that he cannot remember any case where a deduction was ever made the basis of a criminal case, 340 as far as I know that was never made the basis of a criminal case but that is just as immaterial as a lot of other cases. Your Honor, the statute says—

The Court: The statute is here and you have a right to make an indictment under it.

Mr. Ziffren: The statute says the attempt to evade taxes in any manner, and it doesn't make any difference how they do it.

341 After hearing argument of counsel, the Court overruled the said motions to dismiss the indictment and for directed verdicts as follows, saying:

"A trial judge in a criminal case sometimes regrets the fact that the government has no right to an appeal. That fact, under our present laws is sometimes a deterrent upon the otherwise preaction of the Court. This

isn't a civil suit, it is a criminal case, and if I do not direct a verdict of not guilty in this case, the defendants may be acquitted by the jury, and if convicted they can appeal. It is always a question of what is the duty of the trial judge. I made a remark recently in a case that I tried of some importance that we must recognize the fact today, without commenting on whether it is desirable or undesirable, that the law is less certain than it has been very many years in the past, that precedents are not adhered to as they have been adhered to and I personally, in my thirty eight years at the Bar and upon the Bench have concluded that never was I less certain of the correctness of a legal decision in any case.

"Now, what is the duty of the trial Judge in that situation? Must he assume to say that the Court of Appeals or the Supreme Court will approve every thought he has about the law? And that if it gets to the Supreme

Court of the United States that Court will approve 342 everything that he says and does? Well, I don't know. I am reversed frequently. I was reversed a few weeks ago. I let a case go to a jury in a civil suit. I thought it was a question for the jury. The Court of Appeals didn't think so. One judge dissented; there were four judges, two of whom thought it was a jury question and two thought it was not a jury question. Of course, the Supreme Court, I don't know what they will do. And that situation embodied my own views, and if I should direct a verdict in this case, that would be saying that I feel so certain of what the ultimate decision would be in a Court of Review, that I will take the law in my own hands and acquit these defendants by a directed verdict, but there are different theories as to my position and my obligation in that situation. I prefer, in the present situation, to permit the government to have a chance to carry on its prosecution. After all 343 ries are the official agencies and of course, the agency of the government have the duty on litigated cases.

"There is one question in this case which after all, is an ultimate question of facts to be settled and adjudicated through the principles of law and that is whether the sums that were paid in this case to the individual defendants were the distribution of profits of the corporation, and therefore not deductible in its income tax return.

Well, whether they were in effect in good faith in 343 the payment by the corporation for services rendered

to the corporation and therefore deductible as ordinary and necessary expenses in the operation of its business under Section 146 of the Revenue Act, I think in that situation the government has certain evidence here which it should have the jury's verdict upon, and whatever my own personal views may be, and I admit that I think this is a pretty weak case, I prefer to let it go to the jury and see what develops.

The motions and each of them will be denied and an exception allowed. You may bring in the jury.

344 Thereupon, the defendants and each of them rested and made motions to dismiss the indictments and for directed verdicts at the close of all the evidence, adopting by leave of court, the motions of the defendants to dismiss the indictments and for directed verdicts made at the close of the Government's case.

Whereupon, the Court overruled the said motions and allowed exceptions thereto.

Thereupon, counsel made arguments to the jury.

345 Thereupon, the court instructed the jury as follows:

COURT'S CHARGE TO THE JURY.

The Court: Ladies and Gentlemen:

You have patiently sat for several days now listening to the testimony and argument of counsel in this case and I apprehend that you are anxious to have it brought to a conclusion. So I shall be as brief as is consistent with the necessities of the case in my remarks to you as to the law which should govern you in your decision.

I have told you in the beginning that you, as the jurors, are the most essential element of this agency of the government, this judicial agency of the government, for the disposition of controverted questions of fact. You are the sole judges of the credibility of the witnesses who have testified here and if I indicate to you or if you think that I indicate to you some opinion one way or another in my mind upon any of the facts involved in this case it is your duty to ignore it and to decide the facts for yourselves. I shall not intentionally do so but it may seem to you that certain inferences grow out of what I say or that there are certain implications in what I say, indicating some opinion upon my part. If so, you shall ignore it, because, after all, under our Constitution and the

346 laws of this land, upon you is put the burden, the obligation to decide coldly and impartially, without bias, without spite, without prejudice, coldly and impartially the questions of fact that are involved

Now, as you are well aware, there are five counts in this indictment. The defendants who are indicted, as I told you in the beginning, are the corporation, the Consensus Publishing Company, and the individuals, William Molasky, Arnold W. Kruse, Lester A. Kruse, James M. Ragen and James M. Ragen, Jr., and they are charged in the first four counts of this indictment with the wilful, intentional attempt to defeat taxes, income taxes, of the Consensus Publishing Company.

Each of those counts relates to a different year and charges in each of those years such an attempt. Those counts are based upon the statute which provides that any person who wilfully attempts in any manner to evade or defeat any tax imposed by law, or the payment thereof, shall, in addition to the other penalties provided by law, be deemed guilty of a crime.

And it is charged in each of those four counts that this attempt was made in the form of receiving from the corporation moneys designated as commissions which were deducted from the Consensus income tax returns.

The fifth count charges that the same defendants conspired to commit an offense against the United States, namely, to attempt wilfully and intentionally to evade taxes upon income of the Consensus Publishing Company during the years 1929 to 1936; I think those are the years. At any rate, the indictment shows.

And the means by which this conspiracy is said to have been effected is the collection by the individuals of commissions deducted from its income in the tax return of the Consensus Publishing Company, which the government asserts in the indictment should have been treated as dividends or shares of profits in the corporation and, therefore, not deductible in the income tax returns of the Consensus Company.

This fifth count is based upon a statute of the United States which provides that if two or more persons conspire together to commit an offense against the United States and some one or more thereof do some act in pursuance or in promotion thereof, they shall be deemed guilty of a crime.

That is an offense distinguished from what we ordi-

narily call a substantive offense. I might illustrate it by a common, specific example:

If you and I should enter into an agreement to rob a bank and proceed to the place where the bank is located and break in but before we can rob the bank we are interrupted by officers and flee, though we do not commit a robbery, which is a substantive offense, we will thereby become guilty of a conspiracy. That is, we will have been guilty of entering into an undertaking to violate the laws of the United States and have done some act in promotion thereof.

348 Now, a conspiracy is any contract, agreement, undertaking, scheme or plan in which two or more persons are concerned and to which they knowingly assent, which has for its purposes the violation of the law in the particular manner charged.

In other words, if you and I, without any written agreement, without any oral agreement, by tacit understanding, knowing what is in each other's mind, enter into a tacit understanding which has for its purpose the violation of the law and we do, or some one of us does, some act to promote that purpose, then we will have entered into a conspiracy.

Throughout the trial of this cause certain evidence has been offered and objected to in behalf of some defendants and I have made a ruling that it is admissible against certain defendants and that it is received subject to the objection of the defendants who objected. That is necessary in a conspiracy case. The remarks, the statements, the acts of any co-conspirator while he is a member of the conspiracy and while he is engaged in helping to carry out its purposes, becomes binding upon all of his other fellow co-conspirators, but the statements of one defendant and the acts of any one defendant who is charged with conspiracy jointly with other defendants, are not binding upon the other defendants as co-conspirators until and unless it has been proved by the evidence that there is a conspiracy.

349 No one man can bind another until it is shown that he and the other are part and parcel of an illegal undertaking termed a conspiracy. And so for that reason it becomes your duty in considering the evidence to refrain from considering evidence against one defendant against the others until and unless you are convinced by other evidence in the record beyond all reasonable

doubt that there was an illegal conspiracy or undertaking. When and if you do that you have a right to consider all of the evidence in the case and you must consider all of it, whether it be direct evidence or indirect evidence; that is, whether it be testimony from the witness stand, documentary or circumstantial.

Of course, conspiracies are ordinarily not made out by express written contracts. They ordinarily can be proved only by circumstances. And so in this case, as in almost every case, we have certain circumstances which the government says leads irresistibly to the conclusion that there was a conspiracy and which the defendants say does not, but those circumstances and all the circumstances in the case bearing upon the issues must be considered by you in determining where the truth lies.

Now, I have tried to outline to you the nature of the charges in the five counts,—the substantive counts of wilful, intentional attempts to evade the income taxes of the Consensus Publishing Company, charged in the first, second, third and fourth counts, and the conspiracy count, in the fifth count, charging a conspiracy to evade the 350 income taxes of the Consensus Company for all of the years 1929 to 1936.

We shall consider for a moment the substantive offenses charged. I have read to you the statute, I think, which provides that any wilful, intentional attempt of any person to evade the taxes of any taxpayer shall be deemed a crime.

Now this charge centers about one list of items. It centers about large sums of money that were without any dispute distributed by the Consensus Publishing Company to these defendants over a period of years. We have heard a lot about commissions and dividends. Well, those questions concerning these two items are vitally important in this case, because the Federal statute provides, first of all, that in determining the amount of tax due any taxpayer must account for all of his income, his gains, his earnings and his profits, and that he may, in determining his net income, deduct his ordinary and necessary expenses; that is, the ordinary and necessary expenses of his business.

Unfortunately, we taxpayers do not have the right to deduct our household expenses. We would all be better off if we did. But the business man has a right, and every business corporation has a right, to deduct the

ordinary and necessary expenses of the business. That may include interest, it may include rent, employment services or salaries of executives, it may cover a multitude of ordinary and necessary expenses. After those have been deducted from the gross income in the income tax return, the balance is the net profit of the taxpayer and upon that all corporations, under our laws, must pay an income tax.

"Commissions" have been constantly mentioned in this case. We find that word in certain records; we find "dividends" in certain records. "Commissions," I think, I can safely say, has been used in this case as indicative of the distribution of money to persons for compensation. "Dividends" has been used in this case as indicative of a distribution made by the corporation to its shareholders out of the profits after proper deductions have been made.

The word "dividends," of course, has different connotations in different situations. We speak sometimes of a liquidating dividend, which is a dividend to the shareholders of a corporation which is being liquidated. Of course, that is not income. We have dividends in bankruptcy to creditors who share in the distribution of the assets of a bankrupt, but the word "dividend" has been used here in the sense of a share in the profits of a corporation after proper deductions have been made of its ordinary and necessary expenses of business.

So it is a vital question in this case of whether the Consensus Company was entitled to deduct from its income the sums distributed to the defendants as ordinary and necessary expenses of its business. The question is whether it should not rather have reported that those distributions were distributions of the profits of the company to its shareholders rather than the payment of compensation to employees and about that this whole case centers.

If these sums distributed were distributed as a part of the profits of the corporation, then they should have been accounted for in the income tax report of the Consensus Company as profits and upon that the corporation should have paid a tax, which it did not.

If, on the other hand, if they were intended to and represented actual bona fide compensation to employees of this corporation in the ordinary operation of its business; in other words, if they were ordinary and necessary

expenses of the operation of the business, then they were properly deductible as they were deducted and no tax was due upon them.

There is no charge in this case against any of these individuals so far as their own income taxes are concerned. We are concerned only with the question of whether these men have entered into a conspiracy, into a scheme whereby as a result this corporation, the Consensus Company, under the guise of commissions, distributed to its shareholders sums that actually represented a division of profits.

If these defendants had that kind of a plan and carried it out, if they wilfully and intentionally entered into such an arrangement, there wouldn't be any question 353 of their guilt. And that is the question in this case and I cannot solve it. It is your duty to consider all of the evidence in the case, including the circumstances, and from those, and considering nothing outside of the evidence presented to you, you must answer eventually the question of whether these sums distributed, or a substantial portion thereof, actually represented profits, distribution of profits rather than the payment of compensation.

Men that work for corporations are entitled to proper compensation, whether they be stockholders, directors or officers. They are entitled to reasonable compensation for such services as they may render, irrespective of their official connection with the corporation. On the other hand, shareholders are entitled to a division of the profits of the corporation in the way of dividends and it is for you to decide whether these were, or whether a substantial portion thereof, was a distribution of profits rather than the compensation of employees.

I use the words, "These sums or a substantial portion thereof." It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits. It is not necessary that the government prove all of the figures precisely as they are charged in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern, in the amounts 354 charged in the indictment or substantial parts thereof, diverted them from the form of profits and received them in the form of commissions. That, as I said, comes back always to the ultimate question that you have got to decide.

Now, no man commits a crime when he commits an honest mistake, nor does a man who is ignorant and makes a mistake, or one who honestly makes a mistake or who does something without realizing its legal significance, that is, without realizing that it will effect an unlawful result, is guilty of such a crime as that charged here.

The statute says that before a person can be convicted he must have wilfully made the attempt. "Wilfully" means consciously, knowingly. Of course, if these defendants realized the difference between commissions and dividends and knowing that difference, appreciating the fact that it would materially affect the income tax of this Consensus Company, carried into effect a plan to defeat a part of those taxes, then such, of course, is wilful.

So a part of the proof in this case must be the proof that the acts, if you find the acts charged were committed, were intentional and wilful in that sense.

Now, I shall not attempt to analyze this evidence for you. If I did that I might trespass upon your obligation. And you heard the evidence; you will have before you all the documentary evidence and eventually your decision must control; but I do wish to say to you that there are certain principles of law that you must remember.

3.5 Every man under our Constitution and laws is presumed to be innocent and that presumption controls until and unless it is overcome by proof of guilt beyond all reasonable doubt, proof by the evidence. A reasonable doubt is not a conjectural or chimerical doubt that you may conjure up in your minds in order to acquit the defendants but it is a substantial doubt arising out of a consideration of all of the evidence. It is such a doubt as would cause you to pause and hesitate in the daily transactions of your lives or in your ordinary business transactions. Proof beyond a reasonable doubt is in effect proof to a moral certainty. If you are morally certain that any defendant is guilty, find him guilty. If you are not morally certain that he is guilty, you should acquit him.

You are the sole judges of the facts and the judges of the credibility of the witnesses and when you come to judge the credibility of the witnesses there are certain elemental rules that you should keep in mind. You have a right when you see a witness upon the witness stand, in determining what credit you will extend to him, to observe

his manner upon the witness stand, his apparent frankness or lack of frankness, his apparent candor or lack of candor, the reasonableness or the unreasonableness of his story, his interest or lack of interest in the outcome of the lawsuit, his relationship, if any, to any of the parties and all of the other circumstances surrounding his testimony and from those circumstances determine how much credibility and what credibility you will extend to him.

356 You have a right to find all of the defendants guilty. You have a right to find all of the defendants not guilty. You have a right to find all of them guilty on a part of the counts and not guilty upon the part of the other counts. You have a right to find one defendant guilty or two defendants guilty or three defendants guilty and the others not guilty, or you may find one defendant guilty upon one count and another upon another, but when you come to consider this evidence you must remember that each of these defendants is entitled to individual consideration. You must consider the evidence as it relates to that particular individual and from all of the evidence in the end determine which, if any, of the defendants are guilty under the evidence.

You will have proper forms of verdicts submitted to you and I think these forms are such so that you will have no trouble in finding the proper form for any verdict that you may arrive at.

Are there any suggestions or objections, gentlemen? I may have omitted some feature that you would like me to charge the jury about.

357 Counsel for defendants objected to the instructions to the jury as follows:

“Mr. McInerney: I take exception to the doctrine announced that if they find that this tax, or any substantial part thereof, was evaded or attempted to be evaded, that they may find the defendants guilty. That is the only thing I care to say.”

The court overruled the objection and granted an exception. The court asked if there were any other suggestions. Counsel for defendants then stated as follows:

“Mr. Struett: I want to know whether or not your Honor intended as a distribution of profits—in other words, there may be contracts for employment which provide for a percentage of profits.”

The court thereupon charged the jury further as follows:

"The Court: I think I made that clear.

Dividends must be a division of profits after the ordinary expenses have been paid. If they are a distribution of sums in pursuance of employment contracts, or otherwise, entered into a good faith, they are then ordinary and necessary expenses, but I think that the distinction I have made between dividends and commissions is clear to this jury."

Counsel for defendants then stated as follows:

"Mr. McInerney: Would your Honor care to say anything in connection with the fact that a commission contract, a contingent contract may be an ordinary expense under proper circumstances?"

358 The court thereupon further charged the jury as follows:

"The Court: Undoubtedly under the law any bona fide contract with any employe, whether it is in the form of a contingent contract or fixed amount, is a valid contract. The only question is, is it entered into in good faith, is it an honest undertaking or is it entered into for the purpose of evasion? Those are the questions that you and you alone can decide."

The United States Attorney then stated as follows:

"Mr. Hall: Do you want to include in that, if the court please, that the contract must be for services actually performed?"

The court then stated:

"The Court: Certainly they must be for services actually performed."

Counsel for defendants then stated:

"Mr. Baron: Or to be performed, if it is prospective."

The Court stated:

"The Court: These are all in the past."

Counsel for defendants then stated:

"Mr. Struett: I take it your Honor has only covered the situation that the government has only got to show a substantial part.

The Court: Yes."

Counsel for defendant, William Molasky, adopted the same exception as made by Mr. McInerney.

359 Thereupon, the Jury retired to consider their verdict.

The Jury returned verdicts as follows:

"We, the jury, find the defendants William Molasky, Arnold Kruse, James M. Ragen, Sr., James M. Ragen, Jr., and the Consensus Publishing Company guilty as charged in the indictment and we find the defendant Lester A. Kruse guilty as charged in the fourth and fifth counts and not guilty as charged in the first, second and third counts."

360 Thereupon, the defendants made motions for new trials, the motions were overruled and exceptions allowed. The motions of the defendants for new trials were in words and figures as follows:

Said Motions for new trial appear on pages 247-255 of the Printed Record.

377 Thereupon, the defendants made motions in arrest of judgment, the motions were overruled and exceptions allowed. The motions of the defendants in arrest of judgment were in words and figures as follows:

Said Motions in Arrest of Judgment appear on pages 255-257 of the Printed Record.

387 In passing sentence the Court stated as follows:

The Court: Let me see that verdict, will you?

Of course, we have got to recognize in the beginning that this is not a case where the defendants are charged with having cheated the government in their own income tax returns.

Mr. Hall: If the court please, I have considered that and it does not seem to me that that makes any difference.

The Court: It makes a lot of difference, Mr. Hall. When you or I deliberately cheat the government, when we deliberately deceive the government in our own income tax reports, we are directly offending against the government that gives us protection. Here there is an entirely different kind of offense. I recognize it whether you do or not. These men are charged with having aided and abetted a taxpayer in the evasion of its taxes. They have paid their own taxes. They have accounted for them and to my mind that is quite a determining factor, a distinguishing factor.

Mr. Hall: If the court please—

The Court: What is it?

Mr. Hall: It remains to be seen yet in a trial whether they paid their own taxes or not. So far as the evasion of this corporation tax is concerned they benefited, Ragen got 20 per cent of the taxes saved.

The Court: There is no trial here for anything in
388 the way of their own evasion of taxes, if they had
any, if they have evaded them. Perhaps I should not
have said that they paid their own taxes, but what I
should have said, that so far as this record is concerned
their own taxes are not in question. I cannot punish
them for what they may have done some other time or
some other place.

Mr. Hall: In the Tinkoff case, that, I believe, involved
evasion.

389 The Court: Yes, I sat in the Tinkoff case, I am
thoroughly familiar with it, but in that case the man
who was complaining that he was not a participant was
the man who planned the scheme, set it up, he was re-
sponsible for it, he promulgated this scheme.

Mr. Hall: That is true, and so did some of the defend-
ants in this case.

The Court: I don't look at it exactly in this case the
same as you look at it. One was the machination of the
mind of the man who was hired to secure those returns
for that corporation.

Now, in this case this jury has said that these defend-
ants conspired to aid and abet in the evasion of the taxes
of the Consensus Company. The proof in this case is
far from the convincing proof that a Judge likes to have
in a case.

I am not certain in my own mind that the jury was right
and I am not certain that it was wrong. It is not for me
to say because, after all, we make the jury the judges of
the facts and they have said that they believe these de-
fendants guilty and they find them guilty beyond all rea-
sonable doubt, so we must accept their finding. But there
is an element of uncertainty in the case that does not ap-
peal to me with all the vigor, with all the emphasis that
the ordinary income tax evasion case that I have tried
needs.

I have no patience, no sympathy with a man who lives
under the protection of this government and then cheats
it. The worst example of such cases has been the viola-
tions and embezzlements under the WPA law, the de-
frauding under the WPA law where money is given by
the government, by the taxpayers of this country to people
in the way of dole, for relief, and you find them cheating
and defrauding. With that sort of thing we cannot have
any patience.

390 I am not disposed to be as strict and as stern by any means in this case as I would in such cases as that. I am not going to send these two young men to prison, at least. I will fine each of them a thousand dollars and commit them to jail until the fine is paid. They are young men, they are starting out in the world. They have their future before them. The future is going to be the future that they themselves will carve out for themselves and I am not going to take the chance of injuring them in their attempts to lead decent and clean lives by sentencing them to prison at this time, under this record.

Each of them will be fined one thousand dollars and committed to jail until the fine is paid.

It is a disagreeable task that I have to perform when I sentence a man. It is one in which I have always wondered whether I have exhibited the part of wisdom or not. When a trial judge is charged with the responsibility of disposing of the welfare and the future of men who are convicted of crime before him, of course, he needs must pause and hesitate.

He must remember that violations of the law must be punished, first to deter those who are found guilty and, second, to deter others from the commission of like offenses, but he must also bear in mind that punishment must not be too harsh, too severe and I confess that I am not pleased with the situation or the problem that confronts me at this time on this present record.

391 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

ASSIGNMENT OF ERRORS ON BEHALF OF DEFENDANTS, WILLIAM MOLASKY, ARNOLD W. KRUSE, LESTER A. KRUSE, JAMES M. RAGEN AND JAMES M. RAGEN, JR.

1. The trial court erred in dismissing the immunity pleas of defendants, James M. Ragen, Jr. and William Molasky.

2. The trial court erred in overruling the demurrers of the defendants to the indictment.

3. The trial court erred in overruling the motion of the defendants to dismiss the indictment and for directed verdict at the close of the Government's evidence.

4. The trial court erred in overruling the motion of the defendants to dismiss the indictment and for directed verdict at the close of all the evidence.

5. The trial court erred in overruling the motions of the defendants for new trials, which motions are hereby incorporated herein by reference thereto.

392 6. The trial court erred in overruling the motions of the defendants in arrest of judgment.

7. The indictment and each count thereof fails to state a criminal offense.

8. The alleged offenses charged in each of the counts of the indictment are so lacking in certainty of description in reference to any standard or definition of any crime as to constitute a violation of the Fifth and Sixth Amendments to the Constitution of the United States.

9. The verdict of the jury and the judgment entered pursuant thereto are against the evidence.

10. The verdict of the jury and the judgment entered pursuant thereto are against the law.

11. The verdict of the jury and the judgment entered pursuant thereto are against the law and the evidence.

12. The court erred in admitting incompetent, improper, irrelevant and immaterial evidence offered on behalf of the Government.

13. The court failed to instruct the jury in accordance with the law, but gave instructions which did not correctly state the law applicable to the case.

393 14. There was a fatal variance between the allegations in the indictment and the proof offered by the Government.

15. All the substantial evidence in the case wholly fails to establish that the defendants, or any of them, were guilty of any of the offenses alleged in the indictment. All the substantial evidence of the case wholly fails to establish that any of the defendants committed any offense against the United States.

John L. McInerney,
Attorney for defendants,
James M. Ragen and
James M. Ragen, Jr.

Joseph A. Struett,
Warren Canaday,
Attorneys for defendants,
Arnold W. Kruse and
Lester A. Kruse.

David Baron,
Attorney for defendant,
William Molasky.

394 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—31760) • •

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS, PROCEEDINGS AT THE TRIAL.

Pursuant to order of this court, there was lodged with the trial judge on or before November 22, 1940, the bill of exceptions in the above entitled cause for the court's approval, all parties were notified thereof and the settling of said bill of exceptions was set by the trial court for November 22, 1940.

The trial court being fully advised in the premises, finds that the attached bill of exceptions with the exhibits introduced in evidence in said cause is a true, complete and condensed statement of all the material evidence heard and received before this court and sufficient to present to the reviewing court all the questions of law involved in the rulings to which exceptions were reserved and which were covered by the assignment of errors thereto attached.

Clerk's Certificate.

It Is Therefore Ordered, Adjudged and Decreed that the above and foregoing bill of exceptions, together with the exhibits introduced in evidence in said cause be and the same are hereby approved as a true, correct and complete statement of all the material evidence heard and received in the above entitled cause and is properly prepared in accordance with the rules of the Supreme Court of the United States and the rules of the Circuit Court of Appeals, Seventh Circuit, and the Clerk of this District Court is hereby ordered to include said bill of exceptions, the assignment of errors thereto attached and this order in the transcript of record of said cause certified by him to the United States Circuit Court of Appeals, Seventh Circuit, in accordance with the praecipe of record heretofore filed in this cause.

It Is Further Ordered that the Clerk of this District Court shall likewise forward to the Clerk of the United States Circuit Court of Appeals, together with said bill of exceptions all the original on photostatic copies thereof in lieu of original exhibits offered and introduced in evidence in this cause.

Enter:

William C. Lindley,
Judge.

Dated: November 22nd, 1940.

395 United States of America, }
Northern District of Illinois. } ss.

I, Hoyt King, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Assignment of Errors and Bill of Exceptions In Re: United States vs. William Molasky, et al., D. C. 31760 now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 23rd day of November, A. D. 1940.

(Seal) Hoyt King,
Clerk.

By _____,
Deputy Clerk.

Endorsed: Filed November 23, 1940. Kenneth J. Carrick, Clerk.

And afterwards on, to wit, the 6th day of January, 1941, the following further proceedings were had and entered of record:

Entered
Jan. 6,
1941.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

January 6, 1941.

Before Hon. J. Earl Major, Circuit Judge.
(Caption No. 7462)

On motion of counsel for appellant William Molasky, it is ordered that Additional Assignments of Error on Behalf of Defendant, William Molasky, Nos. 16 and 17, be filed in this cause in this Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

| | | |
|---|---|-----------|
| United States of America, Plaintiff-Appellee, vs. William Molasky, <i>et al.</i> , Defendants-Appellants. | } | No. 7462. |
|---|---|-----------|

ADDITIONAL ASSIGNMENTS OF ERROR ON BEHALF OF DEFENDANT, WILLIAM MOLASKY.

16. The Court erred in denying the petition of William Molasky for an order releasing oaths of secrecy so as to allow him, the Grand Jurors and others present before the Grand Jury to discuss matters which occurred before it with his counsel, and to give him access to the transcript, minutes and notes of the Grand Jury relating to his testimony, so that he might prepare a Plea in Bar, claiming immunity granted by Section 32, Title 15, U. S. C. A.

17. The Court erred in striking the Pleas in Abatement filed on behalf of this defendant seeking to quash the

indictment because of the presence of unauthorized persons before the Grand Jury.

David Baron,
Attorney for Defendant-Appellant,
William Molasky.

(Endorsed) In the United States Circuit Court of Appeals * * (Caption—7462-66) * * Additional Assignment or Error David Baron 916 Federal Commerce Trust Building, St. Louis, Mo. Filed Jan 6-1941 Kenneth J. Carrick, Clerk.

Entered
Jan. 6,
1941

And afterwards on, to wit, the 6th day of January, 1941, the following further proceedings were had and entered of record:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

January 6, 1941.

Before Hon. J. Earl Major, Circuit Judge.

(Caption Nos. 7463-4)

On motion of counsel for appellants James M. Ragen and James M. Ragen, Jr., it is ordered that Additional Assignments of Error on Behalf of Defendants James M. Ragen and James M. Ragen, Jr., Nos. 16 and 17, be filed in these causes in this Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—7463-4) * *

ADDITIONAL ASSIGNMENTS OF ERROR ON BEHALF OF DEFENDANTS JAMES M. RAGEN AND JAMES M. RAGEN, JR.

16. The Court erred in denying the petition of James M. Ragen, Jr. for an order releasing oaths of secrecy so as to allow him, the Grand Jurors and others present before the Grand Jury to discuss matters which occurred

before it with his counsel, and to give him access to the transcript, minutes and notes of the Grand Jury relating to his testimony, so that he might prepare a Plea in Bar, claiming immunity granted by Section 32, Title 15 U. S. C. A.

17. The Court erred in striking the Pleas in Abatement filed on behalf of these defendants seeking to quash the indictment because of the presence of unauthorized persons before the Grand Jury.

John L. McInerney,
Attorney for Defendants-Appellants,
James M. Ragen and James M.
Ragen, Jr.

(Endorsed) In the United States Circuit Court of Appeals * * (Caption—7462-66) * * Additional Assignment of Error Filed Jan 6-1941 Kenneth J. Carrick, Clerk John L. McInerney Attorney at Law One North La Salle Street Central 9760 Chicago

And afterwards on, to wit, the 6th day of January, 1941, the following further proceedings were had and entered of record:

Entered
Jan. 6,
1941.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

January 6, 1941.

Before Hon. J. Earl Major, Circuit Judge.
(Caption Nos. 7465-6)

On motion of counsel for appellants Arnold W. Kruse and Lester A. Kruse, it is ordered that Additional Assignment of Error on Behalf of Defendants Arnold W. Kruse and Lester A. Kruse, No. 16, be filed in these causes in this Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

• • (Caption—7465-6) • •

**ADDITIONAL ASSIGNMENTS OF ERROR ON BE
HALF OF DEFENDANTS, ARNOLD W. KRUSE
AND LESTER A. KRUSE.**

16. The Court erred in striking the Pleas in Abatement filed on behalf of these defendants seeking to quash the indictment because of the presence of unauthorized persons before the Grand Jury.

Joseph A. Struett,
Warren Canaday,
Attorneys for Defendants-Appellants.
Arnold W. Kruse and Lester A.
Kruse.

(Endorsed) In the United States Circuit Court of Appeals • • (Caption—7462-66) • • Additional Assignment of Error Filed Jan 6-1941 Kenneth J. Carrick, Clerk Warren Canady and Joseph A. Struett Board of Trade Building Chicago.

**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

I, **Kenneth J. Carrick**, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed bill of exceptions printed under my supervision and filed on the seventeenth day of December 1940, in the following entitled causes: Causes Nos. 7462, 7463, 7464, 7465, 7466, United States of America, plaintiff-appellee, vs. William Molasky, et al., defendants-appellants, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this sixteenth day of April A. D. 1941.

[SEAL]

KENNETH J. CARRICK,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the third day of October, in the year of Our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

7462

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WILLIAM MOLASKY, DEFENDANT-APPELLANT

7463

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JAMES M. RAGEN, DEFENDANT-APPELLANT

7464

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JAMES M. RAGEN, JR., DEFENDANT-APPELLANT

7465

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

LESTER A. KRUSE, DEFENDANT-APPELLANT

7466

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ARNOLD W. KRUSE, DEFENDANT-APPELLANT

Appeals From the District Court of the United States for the
Northern District of Illinois, Eastern Division

And, to wit: On the twenty-sixth day of February 1941, there
was filed in the office of the Clerk of this Court, the opinion of
the Court, which said opinion is in the words and figures follow-
ing, to wit:

In the United States Circuit Court of Appeals for the Seventh
Circuit

October Term, 1940—January Session, 1941

No. 7462

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WILLIAM MOLASKY, DEFENDANT-APPELLANT

No. 7463

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JAMES M. RAGEN, DEFENDANT-APPELLANT

No. 7464

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JAMES M. RAGEN, JR., DEFENDANT-APPELLANT

No. 7465

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

LESTER A. KRUSE, DEFENDANT-APPELLANT

No. 7466

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ARNOLD W. KRUSE, DEFENDANT-APPELLANT

Appeals from the District Court of the United States for the
Northern District of Illinois, Easter Division

February 26, 1941

Before MAJOR and KERNER, Circuit Judges, and BRIGGLE,
District Judge.

MAJOR, Circuit Judge: These are appeals of William Molasky, James M. Ragen, James M. Ragen, Jr., Lester A. Kruse, and Arnold W. Kruse, from judgments of conviction entered September 12, 1940. The indictment, upon which they were jointly tried, was returned August 22, 1939, by the regular June Term Grand Jury, which had been authorized to continue for the purpose of completing investigations commenced during the June Term. The indictment contained five counts, the first four of which charged these appellants, together with Moses L. Annenberg, Jules Taylor, and Herbert S. Kamin, and the Consensus Publishing Company, an Illinois Corporation (hereinafter referred to as "Consensus"), with wilfully attempting to evade and defeat the Federal tax on the income of Consensus during the years 1933 to 1936, both inclusive, in violation of Section 145 (b), Title 26, U. S. C. A. The fifth count charged the defendants with conspiring to evade and defeat the Federal tax on the income of Consensus for the years 1929 to 1936, both inclusive, in violation of Section 88, Title 18, U. S. C. A.

Prior to trial, the defendants Annenberg, Taylor, and Kamin were dismissed as defendants. The case was tried to a jury which returned a verdict finding all of the instant defendants (appellants) guilty on all counts, except Lester A. Kruse, and finding him guilty on the fourth and fifth counts, upon which verdict the Trial Court entered the judgments now under attack. Pre-

vious to the trial, certain preliminary motions and pleas were filed, some applicable to all, and others to only certain of the defendants.

The appeals may be said, in a general way, to involve the alleged errors of the Trial Court in its denial of motions to dismiss the indictment; in its refusal to permit inspection of the Grand Jury minutes and to discharge the oath of secrecy surrounding the proceedings of the Grand Jury, in striking certain of the defendants' pleas in abatement based upon the presence of unauthorized persons before the Grand Jury, in dismissing special immunity pleas in bar; in the admission of evidence; in its denial of motions for directed verdict, for a new trial and in arrest of judgment, and in the court's charge to the jury.

Insofar as a discussion of the indictment is concerned, it would be sufficient to set forth the charge in abbreviated form. In view of the theories advanced by the respective parties, however, as to the merits of the controversy, it appears material to make a substantial statement regarding the charge as alleged. The first count is typical of the first four and charges that the defendants filed a return in 1934 for the taxable year of 1933, and did unlawfully, wilfully, and knowingly attempt to evade and defeat a large part, to-wit, \$9,678.02 of a tax due to the United States on the income of Consensus, and that the attempt was in the manner following: That Consensus was engaged in the business of printing and selling "Run Down Sheets" to a class of persons known as "Bookmakers"; that it maintained offices in St. Louis, Missouri, and Cincinnati, Ohio; that William Molasky was the President of the Corporation, and that the Corporation was required to file an income tax return for the year in question, inasmuch as it had received a gross income of \$119,960.96. It alleges that the Corporation was entitled to deductions as follows:

| | |
|---------------------------------|-------------|
| Rent on business property | \$562.50 |
| Interest | 89.55 |
| Taxes | 300.00 |
| Depreciation | 1,821.00 |
| Salaries and wages | 12,757.56 |
| Expenses | 23,258.55 |
| Total deductions | \$38,789.16 |

and that it derived a net income of \$81,171.80, upon which it owed a tax of \$13,340.22. It also alleges that the defendants, knowing the corporation's income to be as above set forth, wilfully attempted to evade and defeat a part of the tax, to-wit, \$9,678.02, and as a means of so wilfully attempting to evade and defeat said tax, they filed a sworn return showing the corpora-

tion's gross income to be \$119,960.96, and claiming deductions as follows:

| | |
|--------------------------------|-----------|
| Rent on business property..... | \$562.50 |
| Interest..... | 89.55 |
| Taxes..... | 300.00 |
| Depreciation..... | 1,821.00 |
| Salaries and wages..... | 12,757.56 |
| Commissions..... | 54,537.65 |
| Other expenses..... | 23,258.55 |

| | |
|-----------------------|-------------|
| Total deductions..... | \$93,326.81 |
|-----------------------|-------------|

The indictment further alleges that according to the return as filed, a net income of \$26,634.15 was shown, with a total tax due and payable of \$3,662.20, which was paid.

The second, third, and fourth counts are in substantially the same form as Count One. In fact, they are exactly the same except for such differences as may be occasioned by dates and amounts. It is said that these counts do not state a cause of action and do not sufficiently apprise the defendants of the charge which they are called upon to meet. We think it is true, as contended, that it requires a mathematical computation to determine what item of deduction is charged to be improper. Such calculation readily discloses, however, (Count One) that the item of deduction, "Commissions, \$54,537.65" is the one by which the defendants are charged with attempting to evade the tax. This result follows by subtracting the total deduction of \$38,789.16, admitted to be proper, from the total deduction of \$93,326.81, the amount alleged to have been claimed in the return as filed. Thus, it is apparent that the defendants are charged with claiming an unlawful deduction, designated as commissions, of \$54,537.65. While it is not apparent why the draftsman of the indictment should leave the most essential element of the charge to a process of calculation, rather than make a direct allegation as to the unlawful deduction, yet we are of the view that the defendants were sufficiently apprised of the offense charged. After all, the gist of the offense is the attempt to evade and defeat the tax, and if the defendants were in doubt as to the means alleged, they could have requested a bill of particulars. This was not done, and "we cannot presume that the request would have been refused." *Capone v. United States*, 56 F. (2d) 927, 931.

We do not understand that defendants question the validity of the fifth count of the indictment, but inasmuch as the substance of the charge is material, as will be subsequently developed, it appears not inappropriate to refer to it at this point. It charges the defendants with conspiring to evade and defeat the taxes on

the income of Consensus for the years 1929 to 1936, both inclusive. The gross income, deductions, net income, and tax due for each of the years included in the conspiracy is set forth. For instance, for the year 1933, (the return for this year was made in 1934 as shown in Count One of the indictment) the gross income was alleged as \$119,960.68, deductions \$38,789.16, net income \$81,171.80, and tax due \$13,340.22. There is then set forth for each year an item of improper deduction claimed in the return by reason of alleged false employment contracts. For the year 1933, this item is in the amount of \$54,537.65. The difference between the total net income as reported for the years included in the indictment period, and the correct total net income for those years, as alleged, is the amount upon which it is alleged a tax was payable. In other words, this difference represents the amounts which were claimed as deductions in the tax returns under the heading of commissions. This discrepancy, so it is alleged, resulted in a tax evasion in the sum of \$77,883.53. The count further alleges, among other things, that the defendants were not employed in an executive capacity, nor in any other capacity whatsoever, by the said corporation during the calendar years 1929 to 1936, inclusive, nor did they or any one of them, or anyone for them, render any service to the said corporation, but that the defendants were owners and holders of beneficial interest for themselves and others in the said corporation, and that all of the moneys paid to them and each of them, were, in truth and in fact, distribution of profits and dividends from earnings of the said corporation. Numerous overt acts are alleged which do not appear material to relate.

On October 30, 1939, there was filed by Kruse and Kruse, and on the same date by Molasky, what are designated as petitions for an order releasing the oaths of Grand Jury secrecy. Numerous allegations were made in an attempt to show that this secrecy should be removed and the defendants permitted to inspect the minutes and records of the Grand Jury so that they might properly prepare certain pleas in abatement and bar. (These pleas are later discussed.) The relief sought by these petitions was denied. In our view, it is not necessary to relate in detail the contents of these petitions, as we believe the court correctly ruled thereon. No authorities are cited by the defendants in support of their claimed right in this respect. On the other hand, there are numerous authorities where such procedure has been condemned. *United States v. Garson*, 291 Fed. 646, 649; *Metzler v. United States*, 64 F. (2d) 203, 206; *Cox v. Vaught*, 52 F. (2d) 562. We agree with the authorities generally that the granting of such request would dangerously impair our system of Grand Jury procedure. It would open the way for an exploratory ex-

petition for the purpose of obtaining the Government's evidence, and pave the way for numerous dilatory tactics. We think that the court properly denied such petitions.

On November 15, 1939, there was filed by Molasky, abatement pleas Nos. 1 and 2; on the same date, similar pleas by Kruse and Kruse, and also by the defendants Ragen and Ragen, as well as other defendants, not now before the court. In the first of these pleas, it is claimed the indictment is void for the reason that three special assistants to the Attorney General were, without authority, present before the Grand Jury during the course of the proceedings. The District Court found there was no merit in this plea, and we agree. *Hale v. United States*, 25 F. (2d) 430, 435; *United States v. Amazon Industrial Chemical Corp.*, 55 F. (2d) 254, 258. The second plea attacked the authority of three other special assistants on the ground that, although they were concededly authorized to appear before the Grand Jury, their authority was limited to investigating offenses arising under the Revenue Laws. It is alleged, however, that these assistants also participated in the investigation which resulted in the return of the fifth count of the indictment, charging conspiracy to violate the Revenue Laws. We are of the view that the contention of the defendants in this respect is also without merit. It requires little argument, and no citation of authorities to convince us that the proceedings of a Grand Jury are not invalidated because of the presence of assistants to the Attorney General authorized to conduct an investigation of certain substantive offenses, merely because, during such investigation, evidence may be brought to light concerning the same subject matter of the investigation and which later results in the return of a conspiracy indictment.

We have studied the merits of these abatement pleas and discussed them briefly, even though we have serious doubts that they are a proper subject for our review. Title 28, U. S. C. A., sec. 879, in connection with Sec. 861 (b), appears to preclude a reversal by this court "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact." Without discussing our province in this respect, we refer to *McHie v. McHie*, 78 F. (2d) 351, a decision of this court, wherein these provisions are discussed and interpreted. It appears that the instant plea did not attack the jurisdiction of the court, and unless so, according to this holding, there is no right of review.

On January 10, 1940, there was filed on behalf of Molasky, a special immunity plea in bar. On the same date, a similar plea was filed by Ragen, Jr. On April 1, 1940, an amended plea in bar was filed by Molasky. To these pleas the Government filed

a motion to dismiss, which was allowed. It is to be remembered that while the indictment in the instant case was returned August 22, 1939, the Grand Jury was a continuation from the June Term. This Grand Jury is referred to as the June Income Tax Grand Jury. There was impaneled in July a Grand Jury, charged with investigation of violations of the Sherman Anti-Trust Act, referred to as the Anti-Trust Grand Jury.

We shall first consider Molasky's amended plea. Stating the allegations in a form as abbreviated as the circumstances will permit, it alleges, in substance, that he was served both with a personal subpoena and a subpoena duces tecum, commanding him to appear and testify in behalf of the United States before the Anti-Trust Grand Jury, and to produce certain documents and records of Consensus; that after appearing before said Grand Jury, and after he had been sworn and testified concerning his name and address, claimed the constitutional privilege against testifying to anything that might tend to incriminate him personally, and refused to answer all questions unless granted immunity from prosecution. Whereupon, it alleges that an assistant to the Attorney General of the United States, in charge of such Grand Jury proceedings, stated in the presence of, and to the Grand Jury, that the defendant was granted immunity on all matters and questions put to him by or before said Grand Jury, and that such immunity would apply to any and all matters, transactions and things as to which he might testify. The plea further alleges that after the granting of such immunity, he was required to testify and produce evidence in his possession, and that he gave oral testimony relating to, and proving, the following transactions, matters and things, among others:¹ The facts and transactions leading up to the organization and incorporation of Consensus, transactions with reference to the capital stock and ownership of the same during the years described in the indictment, the employment contracts with reference to commissions and salaries to be paid by Consensus to Molasky and other defendants, the payments of commissions and salaries by Consensus, and to whom, and the duties performed by each of said defendants in behalf of Consensus; expenses and commissions paid by Consensus, dividends paid by Consensus, and tax returns made by Consensus. It alleges, with reference to each of these matters and things, that the testimony given had to do with the years mentioned in the indictment. It further alleges with reference to these matters and things that Molasky was compelled to give answers and to produce evidence relating to and tending to connect him with the allegations of the instant indict-

¹ To conserve space, we do not set forth such matters and things in their entirety, but only in abbreviated form.

ment, and thereby disclosed to the Grand Jury information material and relevant to the transactions, matters and things alleged against him in the indictment and every count thereof, and that the matters and things concerning which such testimony was given, proved, or tended to prove, material allegations of said indictment, and constituted necessary links in a chain of evidence necessary to establish guilt.

The Immunity Statute, contained in the Anti-Trust laws of the United States, (Title 15, Sec. 32, U. S. C. A.) reads, so far as here material, as follows:

"Immunity of witnesses. No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1 to 27, inclusive, of this chapter: * * *

The privilege against self-incrimination, found in the Fifth Amendment to the Constitution of the United States, provides:

"No person shall * * * be compelled in any criminal case to be a witness against himself, * * *

One of the early cases dealing with the question of immunity is that of *Counselman v. Hitchcock*, 142 U. S. 547, wherein the court, in discussing the requirements of such an act, on page 586, said:

"* * * In view of the Constitutional provision, the statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. * * *

A similar immunity statute, contained in the Interstate Commerce Act, was held valid in *Brown v. Walker*, 161 U. S. 591, for the reason that the provision afforded a complete and unlimited immunity, and was, therefore, a valid substitute for the constitutional privilege.

The District Court, in dismissing the plea, stated:

"A plea of immunity under the statute in question, which merely states that a witness testified concerning certain matters is not sufficient. The plea should state the substance of the testimony given by the witness and should show by apt averment of fact that, if it were not for the immunity statute the witness could have invoked the constitutional privilege of silence."

We are of the opinion that this view of the court imposes a requirement upon the pleader of a higher degree than is contemplated by the statute, notwithstanding the Government's contention to the contrary. The Government in its brief, states: "The plea simply alleges that the defendant gave testimony 'concerning' or 'relating to and directly proving' certain transactions,

matters and things. But the pleas nowhere set out what facts were testified to in connection with these transactions, matters and things." The plea alleges, however, that the defendant's oral testimony was concerning, relating to and directly proving such matters and things. As will be subsequently disclosed in this opinion, the matters and things concerning which Molasky was required to testify, as alleged in his plea, were matters and things which constitute the main issues in this case insofar as its merits are concerned. Briefly mentioning a few of them, they are—who owned the stock in Consensus, to whom and for what purpose were the deductions in controversy paid, and, still more important, the issue as to whether such deductions were dividends and, therefore, improperly deducted, or commissions for services rendered. These are some of the matters and things about which Molasky was required to testify before the Grand Jury. How can it be said that testimony regarding such matters and things was not pertinent to, and directly connected with, the charge with which Molasky was subsequently confronted? Surely it should not be held that one who pleads in bar is required to allege, in question and answer form, the testimony as given. To do so would come near to annihilating the immunity statute, as well as the constitutional privilege by which a person is protected from giving testimony.

But it is argued by the Government that the matters alleged have nothing to do with tax evasion and, therefore, are not the subject-matter of immunity. As pointed out, however, the question as to who owned the stock in the corporation, and whether the claimed deductions were commissions or dividends, were essential matters about which the controversy largely revolved. It is also argued that there is no allegation in the plea that the evidence heard before the Anti-Trust Grand Jury was considered by the Income-tax Grand Jury. We do not think such an allegation is necessary. The application of the immunity provision is dependent upon how the information is obtained rather than the use to be made of it thereafter. Furthermore, the testimony thus obtained was available to the Government on the trial and, in fact, appears to have been utilized. It is further argued that there is nothing in the plea to disclose that the income-Tax Grand Jury did not obtain from other sources the information given to the Anti-Trust Grand Jury by Molasky. Neither do we think this allegation was necessary. Again, in our opinion, the language of the immunity provision leaves no room for such construction. As was said in *Doyle v. Hofstader*, 257 N. Y. 244, 177 N. E. 489, in an opinion by Justice Cardozo, on page 493 (N. E.):

"A witness is not required to show, in order to make his privilege available, that the testimony which he declines to give is certain to subject him to prosecution, or that it will prove the whole crime, unaided by testimony from others. It is enough, to wake the privilege into life, that there is a reasonable possibility of prosecution, and that the testimony, though falling short of proving the crime in its entirety, will prove some part or feature of it, will tend to a conviction when combined with proof of other circumstances which others may supply."

The contention that the plea is not sufficiently specific, in stating Molasky's grand jury testimony, places the Government in a rather awkward position. It must be remembered that the detailed testimony of a witness before a Grand Jury is in the possession of the Government and not the witness. That situation is well illustrated in the instant case. Molasky and some of the other defendants attempted by petition to obtain the minutes of the Grand Jury so that they might determine the propriety of a plea in bar. We have held that this request was properly denied. It is our view, however, when the instant plea in bar was presented, that the Government should have been required to take issue thereon. It had possession of the Grand Jury minutes, and it alone was in a position to disclose any misrepresentation in the plea. In no other manner could the assertions contained in the plea be dispelled.

The difficulty confronting a witness in framing a plea in bar is discussed in *Hale v. Henkel*, 201 U. S. 43, 68. The court said:

"The suggestion that a person who has testified compulsorily before a Grand Jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. * * *

After discussing how the evidence may be obtained, the court said:

"* * * It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony * * *." It appears the Court had in mind that the pleader need only allege the general nature of the testimony given by the witness.

The Court below, in dismissing this plea, and the Government here in support of the Court's action, place much stress upon *Heike v. United States*, 227 U. S. 131. We think this case is clearly distinguishable and has very little, if any, application to the instant situation. There the witness was required to produce before the Grand Jury certain records of the American Sugar Refining Company. The testimony was largely, if not entirely,

concerned with the records and books of the corporation. In that case, issue was joined upon the immunity plea, a trial had thereon, and the court directed a verdict for the Government. In sustaining this action, the court, on page 143, said:

"The evidence did not concern any matter of the present charge. Not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof much closer than that they all were dealings of the same sugar company. * * *

As pointed out, the matters and things about which Molasky testified were directly connected with and formed an essential link, if not the entire chain of circumstances relied upon for conviction.

Nor do we think that the corporate exception to the immunity provision is applicable. The plea alleges that he gave oral testimony concerning his personal knowledge of the matters and things described. *Wilson v. United States*, 221 U. S. 361, *Hale v. Henkel*, 201 U. S. 43, *United States v. Goldman*, 28 F. (2d) 424. We are of the opinion, therefore, that the Court erred in dismissing this plea.

The special plea in bar filed by the defendant, James M. Ragen, Jr., also claimed immunity. The disclosures of the plea with reference to the Grand Jury before whom he testified, and the granting of immunity, are substantially the same as those made in the plea of Molasky. It alleged that the defendant gave oral testimony before said Grand Jury "describing his relations in connection with the Consensus Publishing Company, Moses L. Annenberg, William Molasky, and James M. Ragen," and testified fully and stated all facts within his knowledge concerning "said Consensus Publishing Company and this defendant's connection therewith, and salaries and commissions received by him from, and services performed by him, for said Company." Other allegations more general in their nature are to the effect that the testimony which he was required to give was material and relevant to the matters alleged in the indictment. While the allegations of this plea as to the matters and things concerning which he was required to testify are not as complete as those contained in Molasky's plea, yet we think they are sufficient, and what we have said concerning Molasky's plea is applicable to Ragen's. It follows that the court, in our opinion, also erred in dismissing this plea.

This brings us to a consideration of the case on its merits. Notwithstanding that we have held that dismissal of the immunity pleas of Molasky and James M. Ragen, Jr., was erroneous,

we shall treat the case on its merits as it concerns all of the defendants.

It becomes material to make a further statement concerning the facts. The record is voluminous and contains several hundred exhibits, which makes it difficult, if not impossible, to state the relevant facts within any reasonable limitation.

At or about the date of the return of the instant indictment, several other indictments were returned against the defendants and others, most of which charged offenses closely related to those of the present case. In all of these indictments, one of the defendants was Moses L. Annenberg, who appears to have been a leader in the activities concerned in the charge on which the defendants were convicted. Annenberg entered a plea of guilty on another charge, and in conformity with a stipulation made by the Government, the indictment against him in the instant case, and in other cases, was dismissed. None of the defendants in the trial below testified or offered any testimony in his own behalf. The testimony, therefore, was all given by Government witnesses, with the exception of one who was called by the Court at the instance of the Government.

The evidence discloses that in 1929, at the suggestion of Annenberg, it was agreed among him, Kruse, Ragen, Sr., and Molasky that they would take over and operate the business of manufacturing and distributing a card known at a "Run Down Sheet" which, prior thereto, had been distributed by Molasky and a St. Louis party by the name of Sweig. On September 18, 1929, Kruse organized an Illinois corporation known as the "Consensus Publishing Company." There were issued 100 shares of stock of the value of \$5,000. The stock was issued as follows:

| | |
|-----------------|-----------|
| Howard Clark | 20 shares |
| Thomas Ryan | 20 shares |
| William Molasky | 30 shares |
| Jules Taylor | 30 shares |

There was in existence at that time the Cecelia Investment Company (hereinafter referred to as "Cecelia"), a holding company for Annenberg's stock in a large number of corporations. On October 1, 1929, Taylor's 30 shares were reissued to the Cecelia Company. On June 3, 1933, Molasky's 30 shares were reissued, 15 shares to Molasky and 15 shares to B. Hoffman, his niece, and about April 9, 1935, Clark's 20 shares were reissued to one Herbert S. Kamin, an attorney and nephew of Annenberg. The shares issued to Ryan appear to have been subsequently issued to Ragen, Sr., although this is disputed. At any rate it can be said that Clark, Ryan, and Taylor were mere dummy stockholders. So far as we are able to discern nothing of value was

paid for any of the stock. The defendants contend as a matter of fact that none of the stock at any time was owned by them, that it was issued to them by mistake, and that it was always intended to have been issued in its entirety to Cecelia.

The business of Consensus was operated by Molasky in St. Louis where he lived and had his principal office. The business spread and was operated in Cincinnati, Kansas City, Louisville, Lexington, East St. Louis, Dayton, Columbus, and other cities. He also was engaged in the distribution of various newspapers and periodicals published by Annenberg with whom he was associated. During the indictment period Arnold W. Kruse was the general manager of the Daily Racing Form Publishing Company, which Company was located in Chicago, the stock of which was held by Cecelia on behalf of Annenberg, and which published the Racing Form. Consensus, however, had its principal office and place of business in Chicago where Kruse and Ragen were located. James M. Ragen was the general manager of the General News Bureau which collected information, at different race tracks throughout the country, used by bookmakers in connection with the run-down sheets in paying bets on horses.

As stated, the business of Consensus was conducted by Molasky in St. Louis in connection with Arnold W. Kruse, James M. Ragen, and their sons, Lester A. Kruse and James M. Ragen, Jr., in Chicago. The collections comprising the gross income, shown by Consensus in the income tax returns in question, were received through the St. Louis office. Molasky prepared two weekly statements, one showing the amount of collections which he deposited in the name of Consensus in a St. Louis bank, the other the expenses incurred in the St. Louis office, which statements were forwarded to the Chicago office. In the Chicago office there were bookkeepers and stenographers who transcribed the statements furnished by Molasky upon what were called work sheets, and made entries of such transactions on the books of Consensus, consisting of a journal, cash book, and general ledger. These books of Consensus disclosed the gross income as contained in the reports prepared by Molasky, and also the gross income in the exact amount as reported in the income tax returns.

The return filed in 1934 for the taxable year 1933 is typical. The figures for that year have heretofore been set forth in connection with our discussion of the indictment. Each week there was sent from the Chicago office to Molasky in St. Louis a check for expenses incurred. For the year 1933, these amounted to the sum of \$38,789.15, which included large items for salaries, wages, and expenses. The total of these items, it is conceded by the Government—in fact it is so charged in the indictment—was properly deductible. None of these items, however, includes any

compensation or salary for any of the defendants in this suit. We are unable to determine to a certainty, but we are of the opinion that they do not include any salaries or expenses for bookkeepers or office help in the Chicago office. At any rate there were distributed from the Chicago office weekly the net proceeds, the amount reported by Molasky less the money advanced him for expenses, in the following proportions: 30% to Cecelia, 30% to Molasky, 20% to A. W. Kruse, and 20% to J. M. Ragen. This statement must be modified to the extent that in 1931, James M. Ragen had his stock transferred to his son, James M. Ragen, Jr., to whom distribution was thereafter made, and in 1932, the distribution on account of the 20 shares of stock held by Arnold W. Kruse was made to his wife, Alma Kruse until March 16, 1933, and thereafter to his son, Lester A. Kruse. Also for the years 1933-36, both inclusive, one-half of the amounts payable to Molasky were paid to B. Hoffman. All of these distributions were reported in the income tax returns of the individual recipients thereof and entered upon the books of Consensus. It was these distributions made by Consensus and received by the defendants, shown in the income tax return of Consensus as commissions and deducted as such, that constitute the basis for the charge of a willful attempt to evade income tax.

It is not the province of this Court to weigh the testimony but it is our duty to review the record with a view of ascertaining if the defendants had a fair trial upon the charge as alleged in the indictment. This is especially true in view of our conviction derived from a study of the record that the Government's case is not strongly supported. In fact we agree with the District Judge when he said in denying the motions for directed verdict: "I admit that I think this is a pretty weak case." The important matter for consideration is whether the case was tried and submitted to the jury on correct legal principles.

There are two outstanding propositions around which this controversy largely revolves,—one advanced by the Government that the defendants were the owners of the stock, and the other by the defendants that they rendered service to Consensus and were entitled to a lawful deduction in connection therewith. As to the first proposition it is denied by the defendants that they were owners of the stock. (Without entering into a discussion of the evidence in this respect it is sufficient to state that in our judgment the record justifies the conclusion that they were such owners.) The fact that the disbursements were made to the defendants in the same proportion as their stock holdings constitutes the Government's major argument that such disbursements were dividends. This does not necessarily follow. *Austin v. United States*, 28 Fed. (2d) 677. In fact any presumption in

this respect would be overcome by proof that services were rendered for which the disbursements were made or could have been made.

On the other hand, we think the major argument advanced by the defendants to the effect that services were rendered to the corporation for which deductions might have been lawfully made is plainly disclosed. While the Government contends to the contrary, yet counsel for the Government in his opening statement to the jury said: "The defendants, Arnold W. Kruse and James M. Ragen had very little if anything to do in the operation of the company's business * * * William Molasky actually ran the business and did considerable work * * *." The trial Judge was of the opinion that "some and perhaps all of the defendants" rendered services to Consensus and so stated during the argument on the motion for directed verdict. We think there is considerable testimony in the record of services rendered by Molasky, who was president of Consensus, as well as by Kruse, Sr., and some evidence of services performed by the other defendants. There was no proof and no effort by the Government to show that the services disclosed constituted the total of those performed and no effort to show the reasonable value of such services.

It does not require a great deal of proof to be convincing that the executives, managers, and employees of a corporation which earned a gross income of \$119,960.96 for the year 1933 (in some years the income was much greater) rendered services and were reasonably entitled to substantial salaries. In 1929, Consensus took over a business—if it can be thus dignified—that was a losing proposition, and made it a financial success. So far as is disclosed by this record, these defendants alone were responsible for that success. According to the Government's theory, no executive ability was displayed and no service rendered for which the defendants were entitled to compensation or salary. Such a theory is incredible.

Furthermore, defendants contend that there was an agreement in 1929, prior to the incorporation of Consensus, between them and Annenberg, that Cecelia should take 30% of the profits as the owner of the business, Molasky 30%, and Ragen, Sr. and Arnold Kruse each 20% as compensation for services in the operation of the company. There is testimony which sustains this contention. True, the Government argues that it is unbelievable, even though it came from Government witnesses. It appears to us, however, that the validity of such agreement is of little importance, and certainly not controlling. We should think that the defendants would impliedly be entitled to compensation for services rendered irrespective of an express agreement relative thereto.

Under the Government's theory, however, it is immaterial and irrelevant as to whether the defendants performed services for which they might have been entitled to compensation or salary. The case was tried and is presented here on that theory. In other words, the Government argues that conceding the defendants rendered services for which they might have been entitled to compensation, yet the disbursements were received as corporation dividends and were, therefore, unlawful deductions. Assuming there is evidence which sustains the contention that the disbursements were, on some occasions, recognized as dividends, is that sufficient to show that the deductions were unlawful? The terms "dividends" and "commissions" appear to have been used interchangeably by the bookkeepers for Consensus on the work sheets and on the statements furnished the defendants each week. There is testimony, much stressed, that during the years 1932 to 1935, all the stock in Consensus was issued to Cecelia, the shares held by the various defendants and dummies destroyed and the so-called employment contracts executed and dated back to cover prior years since the organization of Consensus. This was done largely by Kamin (originally a defendant, lawyer, and nephew of Annenberg, dismissed out of the instant case) who worked under the supervision of Arnold W. Kruse. That these facts and circumstances strongly indicate that some sort of chicanery was in progress cannot be doubted. But its efficacy as proof that the defendants were evading the income tax of Consensus by charging as commissions that which they knew to be dividends, is difficult to discern. If the Government's theory is correct that the disbursements were made solely as dividends, notwithstanding the fact that services were rendered by the defendants, then we have the anomalous situation wherein the defendants willfully attempted to evade the tax by unlawfully claiming as deductions that which they could have lawfully claimed.

Another fact unfavorable to the Government is that each year during the indictment period, the return filed by Consensus, as well as the corporate books, plainly disclosed the gross income, admittedly correct, as well as the item of deduction now claimed to be unlawful. Not only that, the return disclosed how this item was divided among the various defendants. During the years in question, the Auditors of the Revenue service, on numerous occasions, audited the returns and checked them with the corporation records. Such disclosure, by the taxpayer, if intended as a plan of tax evasion, is consistent only with gross ignorance on the part of those who devised the plan. Whatever may be said of these defendants, we do not think they can be charged with such ignorance. Also the record discloses that B. Hoffman, to whom Molasky in 1933,

assigned 15 shares of stock in Consensus, in her individual tax return for certain years, showed the money received from Consensus as dividends. The Revenue officials pointed out to her that she was in error in this respect and that such receipts must be shown as commissions. On this basis, an additional tax was assessed against her.

The Government in its brief and in oral argument before this Court asserts that the deductions in question must be treated either as dividends in their entirety, and if so as unlawful deductions, or as commissions in their entirety, and therefore properly deducted. In other words, in accordance with this argument there can be no middle ground. We agree with this argument for two reasons: First, it was directly alleged in the conspiracy count of the indictment and impliedly in the other counts that none of the defendants "rendered any services to the said corporation." Thus the question was directly in issue and the Government had the burden of establishing the affirmative. Second, it is a serious question whether a prosecution for income tax evasion, founded upon improper deductions, can succeed where the proof is other than that the deductions are improper in their entirety.

Section 23 (a) of the Internal Revenue Code (26 U. S. C. A. Sec. 23 (a)) allows deductions in computing a net income for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *". The reported cases, dealing with criminal responsibility for tax evasion, are, so far as we are aware, predicated upon a failure to file a return, or if filing a return, failure to report the correct gross income. We find no case where the evasion charged was based upon an improper deduction. We have reached the conclusion that where a statute permits a reasonable deduction for services, a criminal prosecution can not be maintained by proof other than that such services were not rendered. It is not sufficient to allege or prove that a deduction claimed for services is unlawful because the amount charged is unreasonable. Such a charge would leave to the trier of the facts the responsibility for fixing the standard by which a defendant's guilt would be determined. The standard would vary according to the views of different courts and juries. Such a theory would be violative of the defendant's constitutional rights, and void. *United States v. Cohen Grocery Co.*, 255 U. S. 81; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221; *Collins v. Kentucky*, 234 U. S. 634, 638.

The principle may be illustrated by reference to the deduction of \$2,000 allowed to a person as head of a family. Assume A is charged with attempting to evade his tax by claiming a deduction

of \$2,000 as head of a family, knowing that such is not the case. On a trial it develops that A is the head of a family. That, of course, would be fatal to the Government's case. Assume further that the statute provided a reasonable deduction for a person at the head of a family, taking into consideration the size of his family and station in life. That would be a deduction privilege somewhat similar to "a reasonable allowance for salaries or other compensation for personal services actually rendered." Assume, under a provision of this character, A was charged with tax evasion by claiming a deduction of a certain amount as the head of a family, knowing that such was not the case. The proof discloses that he is not the head of a family. He is, therefore, entitled to no deduction and could properly be convicted. Assume again, however, that the proof shows him to be the head of a family. We should think that would end the prosecution. The only question remaining would be the reasonableness of the deduction. That would be a matter concerning which honest individuals, as well as courts and juries, might differ. An unreasonable deduction by such an individual might form a valid basis for a civil suit but not for a criminal prosecution.

So it is in the instant case. The defendants are charged, necessarily we think, with causing an improper deduction in its entirety in the returns of Consensus. The proof shows without doubt what they rendered service to Consensus and were entitled to compensation therefor in the form of salary or otherwise. When that situation developed in the trial we are of the opinion that it should have proceeded no further. Of course, it may be argued that it was still a jury question as to whether the deductions were dividends in their entirety or commissions for services rendered. Assuming without agreeing, that such is the case, we come to the alleged error of the Court in its charge to the jury which in part is as follows:

"* * * it is for you to decide whether these were, or whether a substantial portion thereof, was a distribution of profits rather than the compensation of employees.

"I use the words 'These sums or a substantial portion thereof.' It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits. * * * It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern, in the amounts charged in the indictment or substantial parts thereof, diverted them from the form of profits and received them in the form of commissions. * * *"

The jury was thus advised in effect that in order to convict it was only necessary that a substantial portion of the profits of Consensus were distributed to the defendants as dividends. This statement was neither consistent with the indictment nor the theory

upon which the case was tried. Furthermore, it clothed the jury with the right to determine what portions of the sums received by defendants were a distribution of profits and what portions were to be deemed reasonable compensation for services. If any portion of such sums was properly received as compensation for services then it is subject to the fatal objection that the jury was permitted to fix the standard. It is true that this particular portion of the charge appears less harmful when read in connection with the charge as a whole than when standing alone. Yet we do not agree that its harmful effect was eliminated by other portions of the charge. Who can say but that the jury might well have reasoned that the distributions made to the defendants were partly for services rendered and partly for profits in the form of dividends, but that the latter constituted a substantial portion and was, therefore, the guide by which they arrived at a verdict of guilty.

We have not overlooked the Government's argument that every means alleged in a conspiracy charge need not be proved. Here, however, there was only one means alleged and that was that the defendants caused Consensus to take a deduction as commissions when no services were rendered and with knowledge that the deductions were dividends or a division of profits.

In view of what we have said it follows that the judgments must be and are hereby Reversed and the Cause Remanded.

KERNER, C. J.: I am unable to concur in that part of the opinion holding that the District Court erred in instructing the jury.

The gist of the offense was the wilful attempt to evade and defeat income taxes. Whether there was such a wilful attempt in this case was the province of the jury to determine from the evidence. In passing upon the sufficiency of the proof, it is not our province to weigh or determine the credibility of the witnesses. We must take that view of the evidence most favorable to the appellee and sustain the verdict of the jury if there is substantial evidence to support it.

The record clearly discloses that Howard Clark was bookkeeper for the Consensus Company and that in keeping the books he took his instructions from Kruse, Sr., who told him to charge 30% of the net profits to Cecelia as dividends, and the remaining 70% would be distributed to Molasky, Kruse, S., and Ragen, Sr., as commissions.

The record also discloses that at the close of each week all of the profits remaining after the payment of the operating expenses were distributed weekly in proportion to the number of shares owned by the stockholders. The profits were called dividends on all of the work papers of the bookkeepers. While it is true that what they were styled by the defendants did not necessarily determine their character, nevertheless it was for the jury to say from all the

evidence whether there was here a willful attempt to evade and defeat the just payment of income taxes. This the jury did. I believe there was ample proof of acts and that the reasonable inferences flowing therefrom warranted the verdict that there was a willful attempt to evade the payment of income taxes.

The amount of the tax which it was charged was attempted to be evaded was not of the gist of the offense. *Gleckman v. United States*, 80 F. (2) 394, nor was it necessary that the Government prove an evasion of all the tax charge, *Tinkoff v. United States*, 86 F. (2) 868.

It is elementary that any specific given instruction must be considered in relation to the entire charge. The instructions were exceedingly fair and thorough, and when the entire charge is considered, it is clear the jury was distinctly called upon to decide whether the defendants entered into a scheme to willfully evade the payment of income taxes.

The judgment as to the appellants, James M. Ragen, Sr., Arnold W. Kruse, and Lester A. Kruse, should be affirmed.

A true copy.

Teste:

Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

And on the same day, to wit: On the twenty-sixth day of February 1941, the following further proceedings were had and entered of record, to wit:

- Wednesday, February 26, 1941

Court met pursuant to adjournment

Before, Hon. J. EARL MAJOR, Circuit Judge; Hon. OTTO KERNER, Circuit Judge; Hon. CHARLES G. BRIGGLE, District Judge.

7462

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WILLIAM MOLASKY, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the
Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern

District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court.

7463

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES M. RAGEN, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the
Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court.

7464

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES M. RAGEN, JR., DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the
Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court.

7465

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

LESTER A. KRUSE, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the
Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court.

7466

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ARNOLD W. KRUSE, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the
Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court.

And afterwards, to wit: On the seventh day of March 1941 there was filed in the office of the Clerk of this Court a petition for a rehearing (in causes Nos. 7462, 7463, 7464, 7465, and 7466), which said petition for a rehearing is not copied here.

And afterwards, to wit: On the eighteenth day of March 1941 the following further proceedings were had and entered of record, to wit:

It is ordered by the Court that the petition for a rehearing of these causes be, and it is hereby, denied.

United States Circuit Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages contain a true copy of the opinion filed on the twenty-sixth day of February 1941, the judgments entered on the twenty-sixth day of February, a reference to filing of petition for rehearing and order denying said petition for rehearing, in the following entitled causes: Cause Nos. 7462, 7463, 7464, 7465, 7466, United States of America, plaintiff-appellee vs. William Molasky, et. al., defendant-appellants, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this sixteenth day of April, A. D., 1941.

[SEAL]

KENNETH J. CARRICK,

*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

Supreme Court of the United States

No. 54—October Term, 1941

Order allowing certiorari

Filed June 2, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 55—October Term, 1941

Order allowing certiorari

Filed June 2, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 56—October Term, 1941

Order allowing certiorari

Filed June 2, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

APR 22

CW 11.15 12.00

Nos. 974-976

In the Supreme Court of the United States

OCTOBER TERM, 1919

THE UNITED STATES OF AMERICA, PETITIONER

v.

JAMES M. RAGEN, SR., ARNOLD W. KRUSE, AND
LESTER A. KRUSE

PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

INDEX

| | Page |
|--|------|
| Opinions below..... | 1 |
| Jurisdiction..... | 2 |
| Questions presented..... | 2 |
| Statutes and regulations involved..... | 2 |
| Statement..... | 3 |
| Reasons for granting the writ..... | 9 |
| Conclusion..... | 15 |
| Appendix..... | 16 |

CITATIONS

Cases:

| | |
|--|----|
| <i>Bennett v. United States</i> , 227 U. S. 333..... | 15 |
| <i>Berger v. United States</i> , 295 U. S. 78..... | 15 |
| <i>Gleickman v. United States</i> , 80 F. (2d) 394, certiorari denied, 297 U. S. 709..... | 11 |
| <i>Goria v. United States</i> , Nos. 87-88, this Term, decided January 13, 1941..... | 12 |
| <i>Hygrade Provision Co. v. Sherman</i> , 266 U. S. 497..... | 12 |
| <i>Omahechearria v. Idaho</i> , 246 U. S. 343..... | 12 |
| <i>United States v. Cohen Grocery Co.</i> , 255 U. S. 81..... | 11 |
| <i>United States v. Kelley</i> , 105 F. (2d) 912..... | 12 |
| <i>Zimmerman, In re</i> , 108 F. (2d) 370..... | 12 |

Statutes:

| | |
|---|----|
| Revenue Act of 1932, c. 209, 47 Stat. 169: | |
| Section 23..... | 16 |
| Section 145..... | 16 |
| Revenue Act of 1934, c. 277, 48 Stat. 680: | |
| Section 23 (U. S. C., Title 26, Sec. 23)..... | 16 |
| Section 145 (U. S. C., Title 26, Sec. 145)..... | 16 |
| Revenue Act of 1936, c. 690, 49 Stat. 1648: | |
| Section 23..... | 17 |
| Section 145..... | 17 |

Internal Revenue Code (53 Stat.):

| | |
|--------------------------|----|
| Sec. 23 (a) (1)..... | 13 |
| Sec. 23 (k) (1)..... | 13 |
| Sec. 23 (l)..... | 13 |
| Sec. 23 (m)..... | 13 |
| Sec. 23 (p) (1)..... | 13 |
| Sec. 25 (a) (4) (A)..... | 13 |
| Sec. 27 (a) (4)..... | 13 |

II

Internal Revenue Code (53 Stat.)—Continued.

| | Page |
|---|------|
| Sec. 27 (d), (e), (f) | 13 |
| Sec. 101 (4) | 13 |
| Sec. 101 (6) | 13 |
| Sec. 101 (12) | 13 |
| Sec. 102 (a) | 13 |
| Sec. 102 (c) | 14 |
| Sec. 105 | 14 |
| Sec. 112 (b) (1) | 14 |
| Sec. 113 (b) (1) | 14 |
| Sec. 119 (b) | 14 |
| Secs. 166, 167 | 14 |
| Miscellaneous: | |
| Treasury Regulations 77, promulgated under the Revenue Act of 1932: | |
| Article 126 | 17 |
| Treasury Regulations 86, promulgated under the Revenue Act of 1934: | |
| Article 23 (a)-6 | 17 |
| Treasury Regulations 94, promulgated under the Revenue Act of 1936: | |
| Article 23 (a)-6 | 17 |

In the Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 974-976

THE UNITED STATES OF AMERICA, PETITIONER

v.

JAMES M. RAGEN, SR., ARNOLD W. KRUSE, AND
LESTER A. KRUSE

**PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

The Solicitor General, on behalf of the United States prays that a writ of certiorari issue to review the judgments of the Circuit Court of Appeals for the Seventh Circuit, entered February 26, 1941 (R. 506-507), reversing the convictions of the three named respondents under Section 145 (b) of the Revenue Acts of 1932, 1934, and 1936 and Section 88 of Title 18 of the United States Code.

OPINIONS BELOW

The opinions of the United States Circuit Court of Appeals for the Seventh Circuit (R. 487-505) are unreported.

(1)

JURISDICTION

The judgments of the Circuit Court of Appeals were entered February 26, 1941 (R. 505-507). A petition for rehearing was denied March 18, 1941 (R. 507). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court.

QUESTIONS PRESENTED

The respondents were convicted of a wilful evasion of income taxes of a corporation by making payments under the guise of commissions for services which were in fact distributions of profits. The principal question presented is whether there is a sufficiently definite standard of guilt for the jury to convict if any services at all were rendered.¹

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 16-17.

¹ As we read the opinion, this is the only question decided by the court below on this branch of the case. But, as a precautionary measure, we note the following additional questions which may be presented by the decision below: (1) Whether there was substantial evidence to support the verdict of the jury. (2) Whether all of the tax evasion charged by the indictment, or only a substantial portion, need be proved in order to convict. (3) Whether the trial judge properly instructed the jury. (4) Whether there was a fatal variance between the indictment, or the Government's theory of the case, and the proof.

STATEMENT

On August 22, 1939, an indictment in five counts was returned against the defendants and others in the District Court for the Northern District of Illinois, Eastern Division (R. 2-27). The first four counts charged wilful attempts to defeat and evade income taxes of the Consensus Publishing Company, a corporation, for the years 1933 through 1936, and the fifth conspiracy to commit such offenses for the years 1929 through 1936 (R. 2-27). The jury returned a verdict finding each of the defendants guilty on all five counts, except Lester Kruse, who was found guilty on the fourth and fifth counts (R. 237-238). Arnold Kruse was sentenced to eighteen months imprisonment and a \$10,000 fine; William Molasky and James Ragen each to a \$10,000 fine with imprisonment of a year and a day for Ragen, and a year for Molasky; and James Ragen, Jr., and Lester Kruse, the son of Arnold Kruse, each to fines of \$1,000 (R. 239-245).² On appeal to the Circuit Court of Appeals for the Seventh Circuit, the convictions were reversed (R. 505-507). The Government's petition for rehearing was denied on March 18, 1941 (R. 507).

Various preliminary motions and pleas were filed by the defendants which were overruled or denied by the District Court. The Circuit Court of Appeals, however, held that the District Court

² The corporation also was convicted and fined (R. 237, 245), but took no appeal.

erred in dismissing special immunity pleas in bar filed by William Molasky and James Ragen, Jr. (R. 491-496). The Government does not request that this ruling of the Circuit Court of Appeals, which affects only William Molasky and James Ragen, Jr., be reviewed by this Court.

The first four counts of the indictment (R. 2-18) charge severally that for the taxable years 1933 through 1936 the defendants wilfully caused the Consensus Publishing Company to file income tax returns which were false and fraudulent in that the returns deducted from the gross income of Consensus certain amounts designated as "commissions".⁵ The fifth count charges a conspiracy to file correspondingly false returns for the years 1929 through 1936 (R. 18-27). The evidence supporting the verdict of the jury may be summarized as follows:

The Consensus Publishing Company, the taxpayer corporation, was organized in 1929 (R. 334, 373), pursuant to an agreement between Moses Annenberg, Arnold Kruse, Ragen, Sr., and Molasky, for the purpose of carrying on the business of printing and selling "run-down sheets" to bookmakers (R. 323). These sheets were printed and distributed daily, showing the horses running at the different race tracks throughout the country

⁵ The amounts of these deductions for commissions were as follows: 1933, \$54,537.65 (R. 6); 1934, \$60,172.23 (R. 10); 1935, \$76,713.75 (R. 14); 1936, \$119,755.78 (R. 18).

with their post positions and code numbers for deciphering the wire service (R. 393). The evidence shows and the court below found that the 100 shares of stock of the company were first issued to dummies, with the exception of thirty shares which were issued to Molasky (R. 497). While the defendants contend that they were not stockholders and that all the stock belonged to the Cecelia Investment Company, a holding company for Annenberg, the court below recognized that the record justifies the conclusion that the defendants were stockholders (R. 499). The shares of stock were divided as follows: Cecelia Investment Company, thirty shares; Molasky, thirty shares; Arnold Kruse, twenty shares; James Ragen, Sr., twenty shares * (R. 333-334, 384).

The principal business office of the company was in St. Louis, Missouri, and from that office each week was sent to the Chicago offices of the Annenberg companies, which operated under the supervision of Arnold Kruse, reports of all the receipts and expenses of the business, showing the balance of profits remaining after the deduction of expenses (R. 322, 351). The bookkeeper who re-

* Thirty shares originally were issued to Molasky, of which fifteen shares were subsequently transferred to his niece, B. Hoffman (R. 334, 375, 497, 499). Twenty shares originally were issued to A. W. Kruse in the name of Clark and held by Kruse, the distributions thereon being assigned to his wife and son, Lester Kruse (R. 334, 377, 497, 499). Twenty shares were issued to J. M. Ragen and in 1931 were transferred to J. M. Ragen, Jr. (R. 334, 376, 499).

ceived these reports constructed his own work sheets on which he computed the receipts, expenses, net profits and the distribution of those profits (R. 414). Reports showing this information were sent to the stockholders each week (R. 334). The book-keeping system was set up as directed by Arnold Kruse (R. 410, 411, 416).

The net profits of the business were distributed in proportion to the stockholdings (R. 324, 340-341, 358-359). The defendants contend, however, that Cecelia alone received dividends, the rest receiving the remainder of the net profits, or 70%, not as dividends but as commissions for services. The books of the company showed these distributions as commissions, as they would have to if they were to be taken as a deduction for business expense (R. 327, 330). This was in accordance with instructions from Kruse, who told the bookkeepers to charge the net profits of the company amounting to 70% as commissions (R. 411). There is, however, much evidence that the payments were distributions of profits. Some of the bookkeepers' private work sheets showed distributions of "dividends" rather than "commissions" (R. 329-330, 337, 412). Until June, 1933, when the designation was changed to "dividends and commissions," the weekly private reports to the stockholders labeled these distributions as dividends (R. 330, 337). Molasky and his niece reported these distributions as dividends in their tax returns for the years 1933 through 1935

(R. 398 and Ex. 47-53). Kruse advised the bookkeeper that the division between the stockholders was an arbitrary arrangement (R. 342-344).

In 1934, Kruse, becoming concerned about a Board of Tax Appeals decision holding that distributions of profits as commissions but in accordance with stockholdings would not be allowed as a deductible expense (R. 393, 397), instructed an employee to destroy the original stock book of the company and to issue one certificate representing all the capital stock to Cecelia (R. 374-375). This was done, but the original certificates were retained by the stockholders until 1938, when they were carefully torn up or otherwise destroyed (R. 384-385). In 1936, Kruse instructed an employee to draw up written contracts of employment between the company and the individuals in whose name the profits of the company had been distributed (R. 381-384). Purported employment contracts were drawn and dated back over all the years to and including 1930, and were signed in bulk by the individuals (R. 399, 400, 403, 404, 407). The court below, while failing to see their relevance to income tax evasion, recognized that these transactions "strongly indicate that some sort of chicanery was in progress" (R. 501).

The court below stated (R. 500) that there was "considerable testimony in the record of services rendered by Molasky, who was president of Consensus, as well as by Kruse, Sr., and some evidence

of services performed by the other defendants." Molasky and Arnold Kruse undoubtedly did perform some services (R. 322-323, 326, 341, 354-355). But there is also evidence that little or no services were performed by the other defendants (R. 341, 353, 355). The witness Burris, who did bookkeeping work for Consensus for two years, testified that he had no knowledge of any work that Lester Kruse, or Ragen, Sr., or Ragen, Jr., ever did for Consensus (R. 341, 344). The bookkeeper Brooks similarly stated that, although he had talked to them over the telephone, he did not know any of the men and had never seen them in the office of Consensus (R. 353, 355).

None of the defendants testified or offered any testimony in his own behalf.

The court charged the jury in part as follows (R. 470-471):

If, on the other hand, if they were intended to and represented actual bona fide compensation to employees of this corporation in the ordinary operation of its business; in other words, if they were ordinary and necessary expenses of the operation of the business, then they were properly deductible as they

The only exception taken to this charge was as follows (R. 473):

"I take exception to the doctrine announced that if they find that this tax, or any substantial part thereof, was evaded or attempted to be evaded, that they may find the defendants guilty."

were deducted and no tax was due upon them.

* * * * *

Men that work for corporations are entitled to proper compensation, whether they be stockholders, directors or officers. They are entitled to reasonable compensation for such services as they may render, irrespective of their official connection with the corporation. On the other hand, shareholders are entitled to a division of the profits of the corporation in the way of dividends and it is for you to decide whether these were, or whether a substantial portion thereof, was a distribution of profits rather than the compensation of employees.

I use the words, "These sums or a substantial portion thereof." It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits. It is not necessary that the government prove all of the figures precisely as they are charged in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern, in the amounts charged in the indictment or substantial parts thereof, diverted them from the form of profits and received them in the form of commissions.

REASONS FOR GRANTING THE WRIT

The single issue before the trial court and the court below was whether the defendants wilfully

attempted and conspired to evade and defeat in any manner the income taxes of the Consensus Publishing Company in violation of Section 145 (b). This was a simple issue of fact resolved beyond a reasonable doubt by the jury's verdict. The majority opinion of the court below, however, contains an elaborate narration of the evidence (R. 497-502). It undertakes to cast a balance between the conflicting inferences, approving some of the Government's contentions (R. 499) and rather more of the respondents' (R. 500-502). The plain inference of this otherwise irrelevant discussion is that the court reversed because it did not think the evidence sufficient to support the verdict. Had it in fact done so, in the face of the considerable and substantial evidence supporting the verdict, it would have been guilty of a flagrant invasion of the province of the jury. But it nowhere makes any such ruling, and indeed asserts that its review of the evidence was only to insure that respondents had a fair trial (R. 499). We do not understand that we can assign error to a gratuitous and rather one-sided narration of evidence, nor object that the differences of opinion between the majority of the court below and the jury on matters of fact doubtless colored its specific rulings of law (cf. R. 503).

The court below, however, ruled in terms (R. 502) that "where a statute permits a reasonable deduction for services, a criminal prosecution cannot be maintained by proof other than that such serv-

ices were not rendered." In its opinion, proof that any compensable services were rendered requires a directed verdict (R. 502, 503). Otherwise, it declared, there is left to each trier of the facts the responsibility of determining a standard for reasonable deductions and this, under the doctrine of *United States v. Coken Grocery Co.*, 255 U. S. 81, violates the constitutional rights of the accused.⁶ This decision seems plainly wrong, conflicts in principle with decisions of this Court, and constitutes a significant threat to the enforcement of the revenue laws.

1. The court below assumed that prosecution and conviction would be possible, under the Government's theory, if only there were proof sufficient to convince the jury that any given deduction was unreasonable (R. 502-504). It proceeded in complete disregard of the fact that the statute requires also that there be a *wilful* attempt at evasion (Sec.

⁶ Apparently in consequence of its views on the constitutional question, the court below held erroneous the charge of the trial court that the jury could convict if it found that any substantial portion of the payments was a distribution of profits (R. 503-504). But, it may be observed, the charge was also entirely proper under the court's own theory, for the jury might have found that in some years one or more defendants rendered no services at all, or that as to some of the defendants some or all the payments were profits in their entirety. If any of the payments were dividends, a fraudulent redaction of tax automatically resulted. The Government is not required to prove an evasion of all the tax charged. *Gleckman v. United States*, 80 F. (2d) 394 (C. C. A. 8th), certiorari denied, 297 U. S. 709.

'45 (b), Revenue Act of 1932, *infra*).⁷ This requirement affords full protection for the innocent and removes all ground for constitutional attack because of indefiniteness. *Gorin v. United States*, Nos. 87-88, this Term, decided January 13, 1941; *Omacchevarria v. Idaho*, 246 U. S. 343, 348; *Hysgrade Provision Co. v. Sherman*, 266 U. S. 497, 501. The contrary ruling of the court below is in substantial conflict with the *Gorin* case, where this Court relied upon the "obvious delimiting words in the statute" requiring "intent or reason to believe."

In *United States v. Kelley*, 105 F. (2d) 912 (C. C. A. 2d), the Court affirmed a conviction of income tax evasion in which the items receiving the chief emphasis related to deductions for depreciation and bad debts. Judge Learned Hand found, with respect to depreciation, that "The padding was both in the number of items contained * * * and in their value." While some of the items were fabricated, the vice in other entries related simply to overvaluation (p. 915). We do not see that the *Kelley* opinion can in this regard be reconciled with the theory of the court below. See also *In re Zimmerman*, 108 F. (2d) 370 (C. C. A. 7th).

2. The question is one of substantial importance in the enforcement of the revenue laws. The court

⁷ The indictment alleges (R. 3, 5, et seq.), that the attempted evasion was wilful and the trial court in its charge required (R. 472) that the jury find the evasion wilful. There was much evidence to show that the evasion was wilful. See Statement, *supra*, pp. 6-7.

below has passed over the requirement of Section 145 (b) that there be wilful evasion and has instead viewed the prosecution as based upon Section 23 (a), permitting deduction of reasonable business expenses. Its decision means that any deduction, so long as it is made under a provision which permits a reasonable deduction, is immune from prosecution, no matter how great the fraud, if only some proportion of the deduction can be shown to be legitimate. The decision below reads an important and wholly unwarranted limitation into Section 145 (b), in which Congress provided for the punishment of "any person who wilfully attempts *in any manner* to evade or defeat any tax."

Many provisions of the income-tax laws require or permit adjustments in gross income or in deduc-

* The following sections of the Internal Revenue Code (53 Stat.) are illustrative: Sec. 23 (a) (1), "All the ordinary and necessary [business] expenses * * * including a reasonable allowance for salaries"; Sec. 23 (k) (1), "Debts ascertained to be worthless"; Sec. 23 (l), "A reasonable allowance" for depreciation and obsolescence; Sec. 23 (m), "a reasonable allowance for depletion"; Sec. 23 (p) (1), "a reasonable amount transferred" to a pension trust; Sec. 25 (a) (4) (A), "a reasonable allowance" for the taxpayer's personal services; Sec. 27 (a) (4), "reasonable" amounts set aside to retire indebtedness; Sec. 27 (d), (e), (f), "fair market value"; Sec. 101 (4), building and loan associations "substantially all the business of which is confined" to membership loans; Sec. 101 (6), organizations "no substantial part of the activities of which is carrying on propaganda"; Sec. 101 (12), agricultural cooperatives "if substantially all" their stock is owned by producers; Sec. 102

tions which are not capable of mathematical calculation.' Under the decision of the court below, for example, it would seem that none could be convicted of a wilful evasion of income taxes so long as he showed that his property had suffered *any* depreciation, or so long as he could show that he had incurred *any* business expense of the challenged type. Tax returns of necessity involve judgment as well as mathematical computations. Because men may differ on the matters of judgment affords no protection to those who wilfully make false returns. Any other rule would make the revenue acts the sport of *any* knave subtle enough to perpetrate his fraud through exaggeration and distortion rather than through reports of wholly imaginary transactions.

The Department in its prosecution policy has not considered that wilful tax evasion was exempt simply because tax items were involved as to

(a), corporations "formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders"; Sec. 102 (c), earnings "permitted to accumulate beyond the reasonable needs of the business"; Sec. 105, oil and gas properties "the principal value of" which has been demonstrated by the taxpayer's exploration; Sec. 112 (b) (1), "property held for productive use in trade or business or for investment (not * * * held primarily for sale * * *)"; Sec. 113 (b) (1), "Proper adjustment" for expenditures, depreciation, etc.; Sec. 119 (b), "expenses, losses, and other deductions properly apportioned or allocated" to income from within the United States; Secs. 166 and 167, "substantial adverse interest" in the disposition of the trust or its income.

which honest men might differ. Under the decision below, it would appear that none may be convicted so long as any part of the deduction was legitimate. This is a restriction upon the enforcement of the revenue acts so serious as to warrant the review of this Court.⁹

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

✓ CHARLES FAHY,
Acting Solicitor General.

APRIL, 1941.

⁹ The court below suggested, but did not in terms rule, that its theory was justified by the form of the indictment and the theory upon which the case was tried (R. 502, 503-504). This is not the case. Count 5 of the indictment, it is true, alleges that none of the defendants performed any services for Consensus (R. 23), while the proof showed that some of the defendants did perform services. But the respondents were under no misapprehension as to the charge against them, which was distributing profits in the guise of salaries and commissions. The variance accordingly was immaterial. See *Berger v. United States*, 295 U. S. 78; *Bennett v. United States*, 227 U. S. 333. The theory of the Government's case was that it was immaterial whether or not services were rendered; if profits were distributed as dividends to stockholders the fraud was no less because some of the stockholders may have rendered services to Consensus. There is nothing inconsistent with this theory in a conviction under a charge that the defendants were guilty if a substantial proportion of the payments in fact represented profits.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

SEC. 145. PENALTIES.

* * * * *

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Revenue Act of 1934, c. 277, 48 Stat. 680:

Section 23 (a) is identical with Section 23 (a) of the Revenue Act of 1932 above quoted. (U. S. C., Title 26, Sec. 23.)

Section 145 (b) is identical with Section 145 (b) of the Revenue Act of 1932 above quoted. (U. S. C., Title 26, Sec. 145.)

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Section 23 (a) is identical with Section 23 (a) of the Revenue Act of 1932 above quoted.

Section 145 (b) is identical with Section 145 (b) of the Revenue Act of 1932 above quoted.

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 126. *Compensation for personal services.*—Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. * * *

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

Article 23 (a)-6 is identical with Article 126 of Treasury Regulations 77 above quoted.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

Article 23 (a)-6 is identical with Article 126 of Treasury Regulations 77 above quoted.

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Nos. 54-56

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, PETITIONER

v.

JAMES M. RAGEN

THE UNITED STATES OF AMERICA, PETITIONER

v.

ARNOLD W. KRUSE

THE UNITED STATES OF AMERICA, PETITIONER

v.

LESTER A. KRUSE

WRITS OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

| | Page |
|---|------|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 14 |
| Specification of errors to be urged | 15 |
| Summary of argument | 17 |
| Argument | |
| I. The prosecution was maintainable even though some services may have been rendered | 22 |
| II. There was no variance between the indictment or the Government's theory of the case, and the proof; the charge to the jury was proper | 30 |
| Conclusion | 35 |
| Appendix | 36 |

CITATIONS

Cases:

| | |
|--|--------------------|
| <i>Bennett v. United States</i> , 227 U. S. 333 | 33 |
| <i>Berger v. United States</i> , 295 U. S. 78 | 33 |
| <i>Burton v. United States</i> , 202 U. S. 344 | 20 |
| <i>Capone v. United States</i> , 56 F. (2d) 927 | 28 |
| <i>Commonwealth v. Reilly</i> , 248 Mass. 1 | 26 |
| <i>Cooper v. United States</i> , 9 F. (2d) 216 | 9 |
| <i>Emmich v. United States</i> , 298 Fed. 5, certiorari denied, 266 U. S. 608 | 27 |
| <i>Gleckman v. United States</i> , 80 F. (2d) 394, certiorari denied, 297 U. S. 709 | 22, 34 |
| <i>Gorin v. United States</i> , 312 U. S. 19 | 26 |
| <i>Guzik v. United States</i> , 54 F. (2d) 618, certiorari denied, 285 U. S. 545 | 9, 21 |
| <i>Hygrade Provision Co. v. Sherman</i> , 266 U. S. 497 | 26 |
| <i>Maddelin v. United States</i> , 46 F. (2d) 266 | 21 |
| <i>Morrissey v. United States</i> , 67 F. (2d) 267 | 21 |
| <i>Nash v. United States</i> , 229 U. S. 373 | 25 |
| <i>Omarcherarria v. Idaho</i> , 246 U. S. 343 | 26 |
| <i>Paschen v. United States</i> , 70 F. (2d) 491 | 28, 34 |
| <i>Tinkoff v. United States</i> , 86 F. (2d) 868, certiorari denied, 301 U. S. 689 | 22, 28, 34 |
| <i>United States v. Brown</i> , 116 F. (2d) 455 | 20 |
| <i>United States v. Cohen Grocery Co.</i> , 255 U. S. 81 | 16, 22, 24, 25, 26 |

II

Cases—Continued.

| | Page |
|---|------|
| <i>United States v. Glasser</i> , 116 F. (2d) 690 | 21 |
| <i>United States v. Kelley</i> , 105 F. (2d) 912 | 28 |
| <i>United States v. Mann</i> , 108 F. (2d) 354 | 20 |
| <i>United States v. Miro</i> , 60 F. (2d) 58 | 27 |
| <i>United States v. Murdock</i> , 290 U. S. 389 | 25 |
| <i>United States v. United States Fidelity Co.</i> , 236 U. S. 512 | 34 |
| <i>United States v. Wurzbach</i> , 280 U. S. 396 | 25 |
| <i>United States v. Zimmerman</i> , 108 F. (2d) 370 | 28 |
| <i>Usary v. State</i> , 112 S. W. (2d) 7 | 26 |
| <i>Wagner v. United States</i> , 118 F. (2d) 801, certiorari denied, No. 180, present Term. | 28 |
| <i>Walker v. United States</i> , 93 F. (2d) 383 | 21 |

Statutes:

Internal Revenue Code:

| | |
|---|----|
| Sec. 23 (U. S. C. Supp. V, Title 26, Sec. 23) | 29 |
| Sec. 25 (U. S. C. Supp. V, Title 26, Sec. 25) | 29 |
| Sec. 27 (U. S. C. Supp. V, Title 26, Sec. 27) | 29 |
| Sec. 101 (U. S. C. Supp. V, Title 26, Sec. 101) | 29 |
| Sec. 102 (U. S. C. Supp. V, Title 26, Sec. 102) | 29 |
| Sec. 105 (U. S. C. Supp. V, Title 26, Sec. 105) | 29 |
| Sec. 112 (U. S. C. Supp. V, Title 26, Sec. 112) | 29 |
| Sec. 113 (U. S. C. Supp. V, Title 26, Sec. 113) | 29 |
| Sec. 119 (U. S. C. Supp. V, Title 26, Sec. 119) | 29 |

Revenue Act of 1932, 47 Stat. 169:

| | |
|----------------|----------------|
| Sec. 23 | 36 |
| Sec. 145 | 22, 24, 27, 36 |

Revenue Act of 1934, 48 Stat. 680:

| | |
|---|----|
| Sec. 23 (U. S. C., Title 26, Sec. 23) | 36 |
| Sec. 145 (U. S. C., Title 26, Sec. 145) | 36 |

Revenue Act of 1936, 49 Stat. 1648:

| | |
|----------------|----|
| Sec. 23 | 37 |
| Sec. 145 | 37 |

Miscellaneous:

| | |
|--|----|
| Treasury Regulations 77, Art. 126 | 37 |
| Treasury Regulations 86, Art. 23 (a)-6 | 37 |
| Treasury Regulations 94, Art. 23 (a)-6 | 37 |

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 54

THE UNITED STATES OF AMERICA, PETITIONER

v.

JAMES M. RAGEN

No. 55

THE UNITED STATES OF AMERICA, PETITIONER

v.

ARNOLD W. KRUSE

No. 56

THE UNITED STATES OF AMERICA, PETITIONER

v.

LESTER A. KRUSE

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 487-505) is reported in 118 F. (2d) 128.

(1)

JURISDICTION

The judgments of the Circuit Court of Appeals were entered February 26, 1941 (R. 505-507). The petition for writs of certiorari was filed April 2, 1941, and granted June 2, 1941 (R. 511). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court.

QUESTION PRESENTED

The respondents were convicted of a wilful evasion of income taxes of a corporation by making distributions of corporate profits to the stockholders under the guise of payments of "commissions" which were deducted from the corporation's gross income. The principal question presented is whether there is a sufficiently definite standard of guilt for the jury to convict if any of the distributees rendered any services at all to the corporation.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 36-37.

STATEMENT

On August 22, 1939, an indictment in five counts was returned against the respondents and others in the District Court for the Northern District of Illinois (R. 2-27). The first four counts

charged the defendants jointly with wilful attempts to defeat and evade income taxes of the Consensus Publishing Company, a corporation, for the years 1933 through 1936 by causing the company to file returns which were false and fraudulent. In substance, the charge was that there were deducted from the gross income of the company as business expenses certain amounts designated as "commissions," which were in fact dividends or distributions of profits (R. 2-18). The deductions thus claimed were as follows: 1933, \$54,537.65 (R. 6); 1934, \$60,172.23 (R. 10); 1935, \$76,713.75 (R. 14); 1936, \$119,755.78 (R. 18).

The fifth count of the indictment charged a conspiracy to commit such offenses for the years 1929 through 1936, consisting of a scheme to distribute the net profits of Consensus in the guise of "commissions" or salaries for services. It was charged that the scheme involved, among other things, the execution of spurious employment contracts and the falsification of books and records (R. 18-27). This count also alleged that the defendants did not in fact perform any services for the company by virtue of the employment contracts.

The jury returned a verdict finding each of the respondents guilty on all five counts, except Lester Kruse, who was found guilty on the fourth and fifth counts (R. 237-238).¹ The court imposed

¹The corporation also was convicted and fined (R. 237, 245), but took no appeal.

the following sentences: Arnold W. Kruse, eighteen months' imprisonment and a \$10,000 fine; William Molasky, a year's imprisonment and a \$10,000 fine; James M. Ragen, Sr., imprisonment of a year and a day and a \$10,000 fine; James Ragen, Jr., and Lester A. Kruse, fines of \$1,000 each (R. 239-245). On appeal to the Circuit Court of Appeals for the Seventh Circuit the convictions were reversed (R. 505-507).² The Government's petition for rehearing was denied on March 18, 1941 (R. 507).

The evidence supporting the verdict of the jury may be summarized as follows:

Organization and Business of the Company.—The Consensus Publishing Company, the taxpayer corporation, was organized under the laws of the State of Illinois in 1929 (R. 334, 373) pursuant to an agreement between Moses L. Annenberg, Arnold W. Kruse, James M. Ragen, Sr., and William Molasky, for the purpose of carrying on the business of printing and selling "run-down" sheets to bookmakers (R. 323, 392). The "run-down" sheet business was originally started in St. Louis in 1927

² Various preliminary motions and pleas were filed by the respondents, which were overruled or denied by the District Court. The Circuit Court of Appeals, however, held that the District Court erred in dismissing special immunity pleas in bar filed by William Molasky and James Ragen, Jr. (R. 491-496). The Government has not requested that this ruling, which affects only William Molasky and James Ragen, Jr., be reviewed by this Court.

or 1928 by Julius Zweig. However, shortly after Molasky brought out a competing sheet, Zweig sold a sixty percent interest in his business to Molasky and associates for \$1,000, and later disposed of his remaining forty percent interest in the same manner for \$9,500 (R. 319, 320). Thereafter the business spread to Cincinnati and other places (R. 498).

The "run-down" sheets, printed and distributed daily, showed the horses running at the various race tracks throughout the country with their post positions and code numbers for deciphering racing information sent out over the wire service furnished by Nationwide News Service, an Annenberg corporation, of which James Ragen was general manager (R. 322, 392). Since the racing information contained in the wire service referred to each horse by "cryptic" code number rather than by name, it was necessary to purchase the "run-down" sheets in order to be able to use the wire service (R. 393).

This business, while lucrative, was mechanically simple. It merely involved noting and printing on a sheet the racing information which came over the News Service wires and the distribution thereof to bookmakers at twenty-five or thirty-five cents a sheet (R. 320-321). Printing and selling costs were low, type setting could be done by one man in four or five hours, and the printing itself by another in one or two hours (R. 321). The collection of receipts, preparation of records and

reports and such supervision of the printing of the sheets as was required, which "wasn't much", was done by Gordon Brooks, an employee of another company owned by Molasky (R. 350-351). In Cincinnati the "run-down" sheets were printed by the American Racing Record, another Annenberg company (R. 356), and distributed by one Surlin, a news distributor for Annenberg (R. 356). All receipts were sent to the St. Louis office where they were received and deposited in a bank account by Brooks (R. 353). The foregoing activities required, at most, about an hour or an hour and a half of his time every day, except that once a week "he might spend three hours" making out the operating reports for the Chicago office (R. 351). In answer to repeated questions by the court at the trial, Brooks testified that there wasn't much supervising that had to be done but that he did all of it and no one else did any (R. 352).

Stock ownership and records.—The 100 shares of stock of the company were divided as follows: Cecelia Investment Company (an Annenberg holding company), thirty shares, Molasky, thirty shares, Arnold Kruse, twenty shares, James Ragen, Sr., twenty shares (R. 333-334, 385).³ The evi-

³ Thirty shares originally were issued to Molasky, of which fifteen shares were subsequently transferred to his niece, B. Hoffman (R. 334, 375, 429, 497, 499). The distributions on the shares in the name of B. Hoffman were deposited in Molasky's own account upon which his niece had no right to

dence shows, as the court below conceded, that the one hundred shares of stock of the company were first issued to "dummies" with the exception of thirty shares which were issued to Molasky (R. 497). The respondents strongly contended that they were not stockholders, and that all the stock was owned by the Cecelia Investment Company. The court below, however, recognized that the record (R. 333, 348, 350, 364) justified the conclusion that the defendants were in fact stockholders (R. 499).

The company maintained its principal business office at St. Louis, Missouri. The books, however, were kept in the Chicago office of the Daily Racing Form, an Annenberg company, and tax returns were filed in the Chicago District. Each week reports of all the receipts and expenses of the

draw (R. 427-429). Twenty shares originally were issued to A. W. Kruse in the name of "Clark," and held by Kruse, the distributions thereon being assigned to his wife and son, Lester Kruse (R. 334, 377, 497, 499); in 1935 a new certificate for these shares was issued in the name of Herbert S. Kamin as "dummy" for Kruse (R. 379, 380). The distributions made in the name of his wife were, however, deposited in his own account (R. 427), as were those made in the name of his son in 1933 and part of 1934 (R. 427, 428); other distributions were placed in an account which was in the name of his son, but all of the checks on which, with few exceptions, were drawn by him (R. 363, 427-429). Twenty shares were issued to J. M. Ragen, the distributions thereon being assigned to J. M. Ragen, Jr., in 1931 (R. 334, 376, 426-428, 499). Changes in the distribution of profits were not accompanied by changes in stock records. In 1937 distributions were again made directly to Molasky and Kruse (R. 429).

business, showing the balance of profits remaining after the deduction of expenses, were sent from the St. Louis office to the Chicago offices of the Annenberg companies, which operated under the supervision of Arnold Kruse (R. 322, 351). The bookkeeper who received these reports constructed his own work sheets on which he computed the receipts, expenses, net profits, and distribution of the profits (R. 414). Reports showing this information were sent to the stockholders each week (R. 334). The bookkeeping system was set up as directed by Arnold Kruse (R. 410, 411, 416).

Distribution of profits.—The net profits of the business were distributed weekly in direct proportion to the stockholdings (R. 324, 340–341, 358–359, 426–428). The respondents contended, however, that Cecelia alone received dividends, the balance of the net profits, or seventy percent, being distributed not as dividends but as commissions for services.⁴ The books of the company showed

⁴The respondents contended, and, although attaching little significance to it, the court below found some testimony to sustain the contention (R. 500), that an arrangement was made at the inception of the business to pay commissions for services. T's contention is based on the testimony of Howard Clark, the first bookkeeper, who was called as a witness of the court, as to a conversation alleged to have taken place at that time between Annenberg, Kruse, Ragen, Sr., and Molasky. The alleged conversation was repeated verbatim three times (R. 416, 419, 421) by the witness at widely spaced intervals in his cross-examination, although he denied having memorized it. In any event, the jury by its verdict rejected this testimony, as it was fully justified in doing.

these distributions as commissions, as was necessary if they were to be claimed as a deduction for business expense (R. 327-330).⁵ This was in accordance with instructions from Kruse who told the bookkeeper to charge seventy percent of the net profits of the company as commissions (R. 411). There is, however, substantial and cogent evidence that the payments were in fact dividends or distributions of profits and not commissions. The confidential weekly reports to the stockholders from October 12, 1929, through August 19, 1933, and from June 5, 1937, through November 5, 1937, labeled these distributions as dividends (R. 330-335, 337, 414).⁶ Similarly, from September 1929, through August 19, 1933, and in some instances thereafter, the private work sheets of the bookkeepers showed distributions of "dividends"

⁵ The court below apparently attached some significance to the fact that the tax returns disclosed the deductions in question (R. 501). Obviously, however, the listing of these deductions in the returns was essential if a reduction of the taxable net income of the corporation were to be secured. Again, the opinion states as a fact that the returns had been audited, implying that the Government had knowledge of the facts. This receives no support in the record, as the trial court repeatedly advised that questions concerning such examinations were immaterial (R. 437, 438, 440). Further, such an examination, even if made, would not be binding on the Government. *Cooper v. United States*, 9 F. (2d) 216, 223 (C. C. A. 8th); *Guzik v. United States*, 54 F. (2d) 618 (C. C. A. 7th), certiorari denied, 285 U. S. 545.

⁶ Most of the other weekly reports used the descriptive phrase "dividends and commissions" (R. 334). One contained the statement "No dividends this week." (R. 337.)

rather than "commissions" (R. 329-330, 337, 338, 358, 361, 411, 412, 418). Molasky and his niece reported these distributions as dividends in their tax returns for the years 1933 through 1935 (R. 398 and Ex. 47-53). A letter from a bookkeeper to Molasky, dated December 21, 1933, stated that "no dividend checks" would be issued until he could talk with Kruse with respect to the five percent tax on dividends (R. 331). Kruse advised the bookkeeper that the division among the stockholders was an arbitrary arrangement (R. 342-344).

Destruction of stock records and execution of pre-dated contracts of employment.—In 1934, Kruse, becoming concerned about a Board of Tax Appeals decision holding that distributions of profits as commissions but in accordance with stockholdings would not be allowed as a deductible expense (R. 393-397), instructed an employee to destroy the original stock book of the company. He also instructed the employee to issue new stock certificates to the original incorporators from a new stock book as of the date of the incorporation of the company, September 18, 1929; and, also as of the same date, to cancel such new certificates and issue one certificate for one hundred shares of stock to Cecelia. The instructions as to the new certificates were followed. The original stock book, however, was not destroyed until sometime later and the original stock certificates were retained by the stockholders until 1938 when they

were carefully torn up or otherwise destroyed.⁷ The destruction of the original stock book, an admittedly "irregular procedure" (R. 379), was desired by Kruse in order to avoid "unnecessary questions" (R. 375) being raised with respect to the stock ownership (R. 376). In April 1935, Kruse himself caused his original stock certificate to be cancelled and a new one from the original stock book, which had not then been destroyed, to be issued in the name of a "dummy" (R. 380).

In 1935, or 1936, Kruse instructed an employee to draw up written contracts of employment between the company and the individuals in whose name the profits of the company had been distributed (R. 381-384). Purported employment contracts were drawn and dated back over all the years to and including 1930, and were signed in bulk by the individuals (R. 399, 400, 403, 404, 407). In addition, corporate minutes reflecting the "stock issue" in 1934 and these contracts were also drawn up and dated back for the entire period from 1930 for which no minutes had previously existed (R. 378, 383, 384).

The court below, while failing to see their relevance to income tax evasion, recognized that these transactions "strongly indicate that some sort of chicanery was in progress" (R. 501).

⁷ Molasky's certificate was torn up and thrown down a toilet, Kruse's was torn up and thrown in a wastebasket, and Ragen's was burned (R. 384, 385).

Whether defendants performed any services.—The court below stated (R. 500) that there was “considerable testimony in the record of services rendered by Molasky, who was president of Consensus, as well as by Kruse, Sr., and some evidence of services performed by the other defendants.” Molasky and Arnold Kruse undoubtedly did perform some services (R. 322–323, 326, 341, 354–355). But there is also evidence that little or no services were performed by the other respondents (R. 341, 353, 355). The witness Burris, an employee of another Annenburg company, who did bookkeeping work for Consensus for two years (R. 339), testified that he had no knowledge of any work that Lester Kruse, or Ragen, Sr., or Ragen, Jr., ever did for Consensus (R. 341, 344). The bookkeeper Brooks similarly stated that, although he had talked to them over the telephone, he did not know any of these men and had never seen them in the office of Consensus (R. 353, 355). When pressed on his statement that he had often talked to Lester Kruse, he was unable to remember when he ever talked to him and finally admitted he had done so only twice (R. 355).

None of the respondents testified or offered any testimony in his own behalf.

The court charged the jury in part as follows* (R. 470–471):

* The only exception taken to this charge was as follows (R. 473):

“I take exception to the doctrine announced at if they find that this tax, or any substantial part thereof, was evaded

So it is a vital question in this case of whether the Consensus Company was entitled to deduct from its income the sums distributed to the defendants as ordinary and necessary expenses of its business. The question is whether it should not rather have reported that those distributions were distributions of the profits of the company to its shareholders rather than the payment of compensation to employees and about that this whole case centers.

* * * * *

If, on the other hand, if they were intended to and represented actual bona fide compensation to employees of this corporation in the ordinary operation of its business; in other words, if they were ordinary and necessary expenses of the operation of the business, then they were properly deductible as they were deducted and no tax was due upon them.

* * * * *

Men that work for corporations are entitled to proper compensation, whether they be stockholders, directors, or officers. They are entitled to reasonable compensation for such services as they may render, irrespective of their official connection with the corporation. On the other hand, shareholders are entitled to a division of the profits of the corporation in the way of dividends and it is for you to decide whether these were, or whether a substantial portion

or attempted to be evaded, that they may find the defendants guilty."

thereof was, a distribution of profits rather than the compensation of employes.

I use the words, "These sums or a substantial portion thereof." *It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits.* It is not necessary that the government prove all of the figures precisely as they are charged in the indictment. *It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern, in the amounts charged in the indictment or substantial parts thereof,* diverted them from the form of profits and received them in the form of commissions. That, as I said, comes back always to the ultimate question that you have got to decide. [Italics supplied.]

SPECIFICATION OF ERRORS TO BE UEGED

1. The Circuit Court of Appeals erred in holding that the standard of guilt was unconstitutionally indefinite.

2. The Circuit Court of Appeals erred in holding that where a statute permits a reasonable deduction for services a criminal prosecution cannot be maintained by proof other than that such services were not rendered.

3. The Circuit Court of Appeals erred in holding that when the proof showed that services had been rendered, the trial should have proceeded no further.

4. The Circuit Court of Appeals erred in holding that the Government had the burden of establishing that none of the defendants rendered any services to the Consensus Publishing Company.

5. The Circuit Court of Appeals erred in holding that the charge of the District Court was improper.

6. The Circuit Court of Appeals erred in reversing the judgments of the District Court.

SUMMARY OF ARGUMENT

I

The single issue raised by the indictment was whether the defendants wilfully attempted and conspired to evade and defeat in any manner the income taxes of the Consensus Publishing Company in violation of Section 145 (b). The indictment did not charge, nor did the Government undertake to prove, that none of the respondents rendered any services to the corporation. The basic question was whether the defendants wilfully and fraudulently employed the "commissions" device as a means for distributing corporate profits to the stockholders, and the evidence presented to the jury was amply sufficient to sustain a finding that they did.

The prosecution was maintainable even though some services may have been rendered. The gist of the offense charged by the indictment is not the

amount of tax evaded, but rather whether there was a wilful attempt "in any manner to evade or defeat any tax." Section 145 (b). The decision below that the prosecution is not maintainable where some services have been rendered erroneously rests upon the doctrine of *United States v. Cohen Grocery Co.*, 255 U. S. 81, where it was held that a criminal statute which is so vague as to compel a man to speculate at his peril as to whether his actions fall within the statute is invalid under the due process clause.

The doctrine of that case has no application here where there is involved the question of the standard of proof before a jury rather than the validity of the statute itself. Moreover, even if the doctrine were otherwise applicable, the court has misapplied it here. The essence of Section 145 (b) is that the evasion must be wilful. Accordingly, the defendant is never left to speculate whether his acts fall within the statutory prohibition.

II

The brief also undertakes not only to show that there was no variance between the indictment, or the Government's theory of the case, and the proof, but also to discuss the propriety of the charge to the jury, although it is not clear to what extent these questions are involved in this case.

ARGUMENT

Introductory.—In substance, the Government contended in the court below that the evidence showed that the defendants were stockholders of the Consensus Publishing Company and attempted to conceal that ownership; that, in an effort to cheat the Government of taxes, they knowingly received dividends on the stock owned and held by them and attempted to conceal and misrepresent the character of these distributions so that they might be fraudulently deducted from the corporation's gross income as business expenses. These contentions are fully consonant with the charges contained in the indictment and are amply sustained by the record.

The first four substantive counts of the indictment, charging wilful attempts to evade and defeat the income taxes of Consensus Publishing Company for the years 1933 through 1936, alleged in substance that the returns of the Company were false and fraudulent in that they included among the deductions taken from gross income certain amounts designated "commissions," which were in fact distributions of profits or dividends. The fifth count, charging a conspiracy to commit similar offenses for the years 1929 to 1936, inclusive, alleged, among other things, that the respondents were not employed in any capacity by the corporation by virtue of the so-called "employment con-

tracts * and rendered no services by virtue of such contracts.

On these charges the single issue before the trial court and the jury was whether the defendants wilfully attempted and conspired to evade and defeat in any manner the income taxes of the Consensus Publishing Company in violation of Section 145 (b). This was a simple issue of fact, resolved by the jury's verdict. The majority opinion of Circuit Judge Major, however, contains an elaborate narration of the evidence (R. 497-502). It undertakes to cast a balance between the conflicting inferences, approving some of the Government's contentions (R. 499), and more of the respondents (R. 500-502). The plain inference of this otherwise irrelevant and rather one-sided discussion is that the court reversed because it did not think the evidence sufficient to support the verdict.⁸ The opinion itself nowhere makes any such express ruling; it does, however, contain the assertion that the Government had the burden of establishing that none of the defendants had rendered any services to the corporation (R. 502), and that the trial should have terminated upon a showing that services had been rendered by at least some of the defendants (R. 503).

⁸ The respondents in their answers to the Government's petition for certiorari assert that the principal question involved is the sufficiency of the evidence (Br. in Op. No. 974 [1940 Term], p. 2; Br. in Op. Nos. 975-976 [1940 Term], p. 3).

It is our position that the verdict was fully warranted even though some of the defendants may have rendered some services, and that the District Court correctly charged the jury (R. 471) that "It is not necessary for the government * * * to prove that all the sums so distributed to these defendants were profits. * * * It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern, in the amounts charged * * * or substantial parts thereof * * *." In short, we contend that, whether or not any services may have been rendered, there has been a criminal violation of the income tax laws if the defendants, with intent to evade taxes, fraudulently utilized the "commissions" device as the means for distributing substantial amounts of corporate earnings to the stockholders. Such, in essence, was the charge to the jury, and its verdict in response thereto is amply supported by the record. The fact that the essential operations of the company were simple and were carried on largely by part-time employees; the fact that at least some of the defendants rendered no services at all, or at best, only fragmentary services; the fact that the profits of the enterprise were distributed weekly in exact proportion to stock ownership;¹⁰ the fact that the bookkeepers' work sheets and weekly reports re-

¹⁰ Since the defendants were in fact stockholders, as the opinion of the court below concedes (R. 499), the contention that seventy percent of the net profits was distributed to the

ferred to these distributions as "dividends"; the fact that Molasky and his niece actually reported the distributions as dividends; the fact that the defendants participated in the destruction of critical documents and in the execution of spurious predated contracts of employment—all these furnish overwhelming support for the jury's conclusion that the "commissions" device was wilfully employed as a means for distributing corporate earnings.

If, in the face of such substantial evidence and the persuasive inferences that may properly be drawn therefrom (*United States v. Mann*, 108 F. (2d) 354 (C. C. A. 7th)), the court in fact reversed because it did not think the evidence sufficient to support the verdict, it would have been guilty of a flagrant invasion of the province of the jury. *Burton v. United States*, 202 U. S. 344; *United States v. Brown*, 116 F. (2d) 455 (C. C. A. 7th); *United States v. Mann*, *supra*. Further, it would have proceeded in complete disregard of the fundamental principles of appellate review that the reviewing court will only look to the record to see if any substantial evidence appears which supports the verdict, and, in determining whether there is such evidence, will view the evidence in

defendants as commissions leads to the anomalous conclusion that only one of the stockholders, the Cecelia Company, received dividends.

the light most favorable to the Government¹¹ (*United States v. Glasser*, 116 F. (2d) 690 (C. C. A. 7th); *Maddelin v. United States*, 46 F. (2d) 266 (C. C. A. 7th); *Walker v. United States*, 93 F. (2d) 383 (C. C. A. 8th)), and will assume that all conflicts were resolved against the respondents. *Morrissey v. United States*, 67 F. (2d) 267 (C. C. A. 9th).

However, the court attempted to avoid running afoul of these rules of appellate review, and did not expressly rule upon the question whether the evidence supported the verdict. Instead, it reversed the judgments upon the ground "that where a statute permits a reasonable deduction for services, a criminal prosecution cannot be maintained by proof other than that such services were not rendered" (R. 502). And the opinion indicated further that proof of the rendition of any compensable service required a directed verdict (R. 503). The contrary result, said the court (R. 502), would leave to the triers of fact the deter-

¹¹ Moreover, belated arguments on the evidence following the refusal of the respondents to take the witness stand are entitled to little consideration.

"The argument is one not infrequently presented to an appellate court, where the accused is convicted on evidence which to him seems unimpressive and which he declined to explain or dispute by his own word spoken from the witness stand. * * * But, on appeal, when he challenges the evidence to support a verdict against him, he cannot fairly ask a court to assume that the prejudicial facts which are unexplained could have been overcome on various hypotheses had the accused testified." *Guzik v. United States*, 54 F. (2d) 618, 620 (C. C. A. 7th).

mination of whether the amount charged is unreasonable, with the consequence that the standard of guilt would be unconstitutionally indefinite. Cf. *United States v. Cohen Grocery Co.*, 255 U. S. 81.

We respectfully submit that the court erred, and will contend first that the prosecution can be maintained even though some services may have been rendered, and second that there was no variance between the indictment, or the Government's theory of the case, and the proof.

I

THE PROSECUTION WAS MAINTAINABLE EVEN THOUGH SOME SERVICES MAY HAVE BEEN RENDERED

1. The gist of the offense charged by the indictment is not the amount of the tax alleged to have been evaded, but rather, in the language of Section 145 (b), *infra*, p. 36, the wilful attempt "in any manner to evade or defeat any tax." *Gleckman v. United States*, 80 F. (2d) 394, 401 (C. C. A. 8th), certiorari denied, 297 U. S. 709. The Government is not required to prove evasion of the entire amount charged. *Tinkoff v. United States*, 86 F. (2d) 868, 878-879 (C. C. A. 7th), certiorari denied, 301 U. S. 689. Accordingly, any variation from the indictment figures is wholly immaterial if, as correctly charged by the trial court, a substantial portion of the payments involved constituted distributions of corporate profits rather than true commissions.

The court below did not deny that ordinarily a conviction could be supported if evasion were proved in a lesser amount than that charged in the indictment. The narrow ruling of the court relates solely to the situation where the evasion is accomplished by means of improper deductions, such as deductions for payments of reasonable compensation. In that situation, said the court (R. 502), the Government must prove that no services at all had been rendered, for, if services had been rendered it would be necessary to determine their reasonable value, resulting in an indefinite standard of guilt.¹² However, it does not

¹² The path marked out by the court below in reaching this conclusion, as we follow it, starts with the finding that some services were rendered, continues with the statement that services are naturally compensable, and ends with the finding that since business expenses are deductible by statute, the issue presented to the jury was whether the respondents had taken deductions of unreasonable amounts for services. Such a charge, according to the court below, furnishes no valid basis for a criminal prosecution as there is lacking a sufficiently definite standard of guilt to guide the jury in its deliberations. The possibility that the jury might justifiably have found that all the distributions in question were dividends is answered by the finding that the trial court's instructions permitted the jury to determine what portions were a distribution of profit and what portions would be deemed reasonable compensation for services. The logic of this progression, we submit, is at best doubtful. Compensation may perhaps ordinarily follow the performance of services, but, particularly in the circumstances here presented, the inevitability of the sequence is by no means clear. Stockholders do not always receive their rewards for such services as they may render in the form of salaries and commissions.

at all follow that even where some services may have been rendered, the distributions may not be dividends in their entirety. But even if it may be necessary to diminish the distributions by the reasonable value of the services rendered, we nevertheless submit that the respondents have perpetrated a fraud upon the revenues and that they were not subjected to an indefinite standard of guilt.

2. The decision below rests upon *United States v. Cohen Grocery Co.*, 255 U. S. 81, and related cases where it was held that a criminal statute so vague in terms as to compel a man at his peril to speculate as to whether his actions fall within the statutory prohibition, violates the constitutional requirement of due process. But that doctrine can have no application to the crimes specified in Section 145 (b), for Congress has there provided for the punishment of "any person who *willfully* attempts in any manner to evade or defeat any tax." [Italics supplied.] This is not language so vague and indefinite that innocent men must at their peril grope for an intelligible meaning.

At the very outset, it should be observed that the court has erroneously extended the doctrine of the *Cohen Grocery* case far beyond its proper limits. That doctrine condemns statutes which, unlike that here involved, contain language so vague as to be incapable of intelligent interpretation. It does not strike at whatever uncertainty may be engendered in the mind of an individual

as to whether or not a jury may find a particular act to fall within the proscriptions of an unambiguous statute. The standard of guilt by which the respondents were judged is no less definite or less susceptible of uniform application than standards applied in cases of manslaughter, for example, where conviction may turn on whether or not there was criminal negligence or adequate provocation or sufficient time for a reasonable man to cool off. Such uncertainty is often present. As this Court pointed out in *Nash v. United States*, 229 U. S. 373, 377:

* * * the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it" by common experience in the circumstances known to the actor. * * *

Cf. *United States v. Warzbach*, 280 U. S. 396, 399.

But even assuming that the doctrine of the *Cohen Grocery* case is otherwise applicable to this type of situation, the court below misapplied it here. It proceeded in complete disregard of the fact that the statute requires that there be a wilful attempt at evasion. *United States v. Murdock*, 290 U. S. 389. This requirement affords

full protection for the innocent and removes all grounds for constitutional attack because of indefiniteness. On several occasions this Court has noted that a successful attack based on undue vagueness cannot be made where the sanctions of the statute apply only if intent or *scienter* is first established. *Omaechevarria v. Idaho*, 246 U. S. 343, 348; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 501.¹⁸ The most recent recognition of the confining force of the requirement of intent is found in *Gorin v. United States*, 312 U. S. 19, involving convictions under the Espionage Act of June 15, 1917. In discussing the contention that certain sections of that Act were too indefinite, this Court said (p. 27):

But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law.

¹⁸ This Court has never held a statute invalid for indefiniteness where *scienter* was clearly required for the violation. Section 4 of the Lever Act was held invalid in *United States v. Cohen Grocery Co.*, *supra*. The statute as quoted in 255 U. S. at 86 reads as though intent were required. But the full text of the section, as set out in 255 U. S. at 81-82, shows that intent was no part of the clauses under attack. As stated in *Gorin v. United States*, 312 U. S. 19, 26, that case "points out that the statute there under consideration forbade no specific act, that it really punished acts 'detrimental to the public interest when unjust and unreasonable' in a jury's view." To the same effect, see *Commonwealth v. Reilly*, 248 Mass. 1, 4-7, 142 N. E. 915, 918 (Mass. 1924); *Usary v. State*, 112 S. W. (2d) 7, 10-11 (Tenn. 1938).

The obvious delimiting words in the statute are those requiring "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." This requires those prosecuted to have acted in bad faith. The sanctions apply only when *scienter* is established.

It seems clear, then, that even assuming that the court below properly construed the charge against the respondents, the rule against indefiniteness has no relevance here. However, we contest the narrow construction placed upon the charge by the court below. The respondents were indicted on the charge that they had wilfully attempted to evade and defeat taxes in violation of Section 145 (b). That section does not particularize the means of violation, but covers all wilful attempts to evade any tax "*in any manner.*" And " * * * by the words 'in any manner' in Section 146 (b) [of the Revenue Act of 1928, substantially identical with the provisions of Section 145 (b) involved herein], Congress indicates an intention to cover all possible methods of evasion; * * *." *United States v. Miro*, 60 F. (2d) 58, 60 (C. C. A. 2d). "The real character of the offense lies, not in the failure to file a return, or in the filing of a false return, but rather in the attempt to defraud the government by evading the tax. The technique may differ, but the opus is the same" *Emanich v. United States*, 298 Fed. 5, 9

(C. C. A. 6th), certiorari denied, 266 U. S. 608. See also *Capone v. United States*, 56 F. (2d) 927 (C. C. A. 7th); *Paschen v. United States*, 70 F. (2d) 491 (C. C. A. 7th).

Whether attempts to evade taxes take the form of false deductions¹¹ or failure to file a return or omission of items of gross income, the crime and the standard by which it is measured remain the same. The standard involved in the trial of this case, we submit, is that prescribed by Section 145 (b) which defines the crime charged against the respondents. The court below, however, has disregarded that standard and passed over the requirement that there be a wilful evasion. Instead, it has seized upon the civil provisions in Section 23 (a), permitting deduction of reasonable business expenses and, in effect, has viewed the prosecution as based on that section. In so doing, it has read an important and wholly unwarranted limitation into Section 145 (b).

This decision means that a taxpayer taking any deduction, so long as it is claimed under a provi-

¹¹ "The court below, in stating that "we find no case where the evasion charged was based upon an improper deduction" (R. 502), overlooked such cases as *Tinkoff v. United States*, *supra*, involving false deductions for bad debts; *United States v. Kelley*, 105 F. (2d) 942 (C. C. A. 2d), involving fraudulent depreciation deductions; and *United States v. Zimmerman*, 108 F. (2d) 370 (C. C. A. 7th). See also *Wagner v. United States*, 118 F. (2d) 801 (C. C. A. 9th), certiorari denied October 13, 1941, No. 180, present Term, affirming a conviction for tax evasion based upon fictitious bad debts and inflated depreciation.

sion which permits a reasonable deduction, is immune from prosecution, no matter how great the fraud, if only some proportion of the deduction can be shown to be legitimate. Many provisions of the income-tax laws require or permit adjustments in gross income or in deductions which are not capable of precise mathematical calculation.¹⁵ Under the decision of the court below, for example, it would

¹⁵ The following sections of the Internal Revenue Code (53 Stat.) are illustrative: Sec. 23 (a) (1), "All the ordinary and necessary [business] expenses * * * including a reasonable allowance for salaries"; Sec. 23 (k) (1), "Debts ascertained to be worthless"; Sec. 23 (l), "A reasonable allowance" for depreciation and obsolescence; Sec. 23 (m), "a reasonable allowance for depletion"; Sec. 23 (p) (1), "a reasonable amount transferred" to a pension trust; Sec. 25 (a) (4) (A), "a reasonable allowance" for the taxpayer's personal services; Sec. 27 (a) (4), "reasonable" amounts set aside to retire indebtedness; Sec. 27 (d), (e), (f), "fair market value"; Sec. 101 (4), building and loan associations "substantially all the business of which is confined" to membership loans; Sec. 101 (6), organizations "no substantial part of the activities of which is carrying on propaganda"; Sec. 101 (12), agricultural cooperatives "if substantially all" their stock is owned by producers; Sec. 102 (a), corporations "formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders"; Sec. 102 (c), earnings "permitted to accumulate beyond the reasonable needs of the business"; Sec. 105, oil and gas properties "the principal value of" which has been demonstrated by the taxpayer's exploration; Sec. 112 (b) (1), "property held for productive use in trade or business or for investment (not * * * held primarily for sale * * *)"; Sec. 113 (b) (1), "Proper adjustment" for expenditures, depreciation, etc.; Sec. 119 (b), "expenses, losses, and other deductions properly apportioned or allocated" to income from within the United States; Secs. 166 and 167, "substantial adverse interest" in the disposition of the trust or its income.

seem that none could be convicted of a wilful evasion of income taxes so long as he showed that his property had suffered *any* depreciation, or so long as he could show that he had incurred *any* business expense of the challenged type. Tax returns of necessity involve judgment as well as mathematical computations. That men may differ on matters of judgment should afford no protection to those who wilfully make false returns. Any other rule would grant a license to evade taxes to those astute or facile enough, in their efforts to cheat the Government, to perpetrate their fraud through exaggeration and distortion rather than through reports of wholly imaginary transactions.

We urge that the intentionally broad scope of the enforcement provisions of the revenue laws should not be, and, in fact are not, subject to so serious a restriction. The crime with which the respondents were charged is clearly embraced within Section 145 (b), and the jury by its verdict has found them guilty of that crime. That verdict, we believe, was fully warranted by the evidence and should stand.

II

THERE WAS NO VARIANCE BETWEEN THE INDICTMENT, OR THE GOVERNMENT'S THEORY OF THE CASE, AND THE PROOF; THE CHARGE TO THE JURY WAS PROPER

1. The court below suggests (R. 502, 503-504) that the indictment, as well as the theory upon

which the case was tried, argued, and briefed, placed upon the Government the burden of establishing that the defendants had not rendered any services. Thus, the court asserts that the indictment charged, impliedly in the first four counts and explicitly in the fifth count that "none of the defendants 'rendered any services to the said corporation.' " This is a clear misreading. The first four counts of the indictment are wholly silent as to the rendition of services. The fifth count does not allege that no services had been performed. Rather, it alleges that none of the defendants performed any services for the corporation *by virtue of the so-called employment contracts* (R. 23). This follows naturally upon the companion charge, supported by substantial evidence, that these contracts, which had been executed in gross and dated back, were spurious. Contrary to the court's assertion, then, the Government did not assume the burden of establishing the affirmative of the proposition that none of the defendants had performed any services.¹⁶ Its burden was limited to the single issue of whether the respondents attempted and conspired to evade and defeat in any manner the income taxes of the Consensus Publishing

¹⁶The same error is present in the answer of the court below to the Government's argument that every means alleged in a conspiracy need not be proved, namely, that here there was but one means alleged "and that was that the defendants caused Consensus to take a deduction as commissions when no services were rendered * * * " (R. 504).

Company in violation of Section 145 (b). Whether or not some services were performed by some of the respondents is not alone decisive of this issue. If profits were distributed as dividends to stockholders, the fraud was no less because some of the stockholders may have rendered services to Concensus. That is merely one fact among many, all of which, together with the inferences that may properly be drawn from them, must be considered. In the aggregate they constitute substantial evidence of guilt and fully justified the verdict of the jury.

Again, according to the court below, "the Government in its brief and in oral argument * * * asserts that the deductions in question must be treated either as dividends in their entirety, and if so as unlawful deductions, or as commissions in their entirety, and therefore properly deducted" (R. 502). From this it appears that the court understood the Government to contend that these deductions *must* be either wholly dividends or wholly commissions, and that conviction was impossible unless they were proved to be dividends in their entirety. We respectfully assert that the Government made no such contention; it did not rely upon any such "all or nothing" theory. The Government did contend that all the distributions were in fact dividends and that the evidence was amply sufficient to warrant a finding by the jury that such was the fact. But the whole includes

all its parts, and it was entirely proper for the jury to determine that at least part of the distributions were dividends. The Government's position that the distributions were dividends in their entirety did not carry with it the implication that if they were not dividends in their entirety no part thereof could be dividends.

Thus, the indictment did not allege, nor was it incumbent upon the Government to prove, that none of the respondents had performed any services for the company. In any event, the respondents were under no misapprehension as to the charge against them, which was the distribution of profits in the guise of salaries and commissions. Accordingly, even assuming that a variance existed, it was immaterial. *Berger v. United States*, 295 U. S. 78; *Bennett v. United States*, 227 U. S. 333.

2. The preceding discussion discloses also the absence of any tenable basis for the suggestion of the court below that the criticized portion of the charge to the jury was neither consistent with the indictment nor the theory upon which the case was tried (R. 503). Further, we believe that viewed as a whole,¹⁷ as of course it must be, the charge was "exceedingly thorough and fair" (Kerner, C. J., dissenting, R. 505). The jury was fully

¹⁷ The court below conceded that "this particular portion of the charge appears less harmful when read in connection with the charge as a whole than when standing alone" (R. 504).

and correctly instructed as to the true issues involved, and when returned to its proper context the unexceptionable character of the portion singled out for criticism becomes manifest. Its purpose was clearly to advise the jury of the settled principle that the Government is not required to prove the entire amount of the tax charged to have been evaded. *Tinkoff v. United States, supra*; *Gleckman v. United States, supra*. It is difficult to conceive how the jury could be misled by this charge. Indeed the only exception taken to it by the respondents was that it embodied the "doctrine" that the jury might find the respondents guilty if it found they evaded any substantial part of the tax (R. 473). That exception is, of course, groundless.¹⁸

Not only was the instruction in question proper; it was a requisite to a fair and complete charge. It is conceivable that the jury might have returned a less sweeping verdict. A dividing line might have been drawn by the jury between the periods before and after the issuance of the new stock certificates in August 1934, or the execution of the so-called

¹⁸ There is a serious question whether the exception taken to the trial court's charge was sufficient to present any question for appellate review. The ground on which the exception was expressly based has no merit, and an exception furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court. *United States v. United States Fidelity Co.*, 236 U. S. 512, 529; *Paschall v. United States*, 70 F. (2d) 491, 503 (C. C. A. 7th).

employment contracts, and at one or the other of these times the respondents, or some of them, might have been found to have exchanged the garb of stockholders for that of employees. Again, the jury might have found that Molasky, who reported his distributions as dividends in his own tax returns for the years 1933, 1934, and 1935, did not participate in the scheme of tax evasion until, as president of the company, he executed the new stock certificates, or, if the employment contracts were believed spurious by the jury, until he executed such an agreement. In each of these hypothetical instances the charge in question would have been essential for conviction.

CONCLUSION

For the reasons set out above, it is respectfully submitted that the respondents were properly convicted and that the decision below should be reversed.

Respectfully submitted,

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Acting Solicitor General.

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ARNOLD RAUM,

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Special Assistants to the Attorney General.

OCTOBER 1941.

APPENDIX

Revenue Act of 1932, 47 Stat. 169:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered: * * *

SEC. 145. PENALTIES.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. * * *

Revenue Act of 1934, 48 Stat. 680:

Section 23 (a) is identical with Section 23 (a) of the Revenue Act of 1932 above quoted. (U. S. C., Title 26, Sec. 23.)

Section 145 (b) is identical with Section 145 (b) of the Revenue Act of 1932 above quoted. (U. S. C., Title 26, Sec. 145.)

Revenue Act of 1936, 49 Stat. 1648:

Section 23 (a) is identical with Section 23 (a) of the Revenue Act of 1932 above quoted.

Section 145 (b) is identical with Section 145 (b) of the Revenue Act of 1932 above quoted.

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 126. *Compensation for personal services.*—Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. * * *

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

Article 23 (a)-6 is identical with Article 126 of Treasury Regulations 77 above quoted.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

Article 23 (a)-6 is identical with Article 126 of Treasury Regulations 77 above quoted.



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 974

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

JAMES M. RAGEN, SR.,

Respondent.

ANSWER OF RESPONDENT, JAMES M. RAGEN, SR.,
TO PETITION FOR WRIT OF CERTIORARI.

JOHN L. MCINERNEY,

*Attorney for Respondent, James
M. Ragen, Sr.*

MATTHIAS CONCANNON,

SIDNEY R. ZATZ,

Of Counsel.

INDEX.

| | PAGE |
|--|------|
| Opinions below | 1 |
| Questions presented | 2 |
| Statement | 4 |
| Reasons for not granting certiorari..... | 4 |
| Conclusion | 14 |
| Appendix | 15 |

CITATIONS.

Cases:

| | |
|--|-----------|
| Connally v. General Construction Company, 269 U. S. 385, 391 | 10 |
| General Talking Pictures Co. v. Western Electric Co., 304 U. S. 175, 178..... | 12 |
| Gorin v. United States, 85 Law. Ed. (Adv. op.) 356 | 7, 10 |
| International Harvester Co. v. Kentucky, 234 U. S. 216, 221..... | 10 |
| United States v. Cohen Grocery Company, 255 U. S. 81 | 7, 10, 11 |
| United States v. Kelly, 105 F. (2d) 912..... | 11 |
| United States v. Zimmerman, 108 F. (2d) 370.. | 11 |

Statutes:

| | |
|---|---|
| Section 23(a) Internal Revenue Code (53 Stat.).. | 9 |
| Section 145(b) Internal Revenue Code (53 Stat.).. | 9 |
| Section 88, Title 18 U. S. C. A..... | 9 |

Treasury Regulations:

| | |
|-------------------------------------|----|
| Regulations 77, Art. 126, 127 | 10 |
| Regulations 86, Art. 23(a)-6 | 10 |
| Art. 23(a)-7 | 10 |
| Regulations 94, Art. 23(a)-6 | 10 |
| Art. 23(a)-7 | 10 |

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OPINIONS BELOW

The opinions of the United States Circuit Court of Appeals for the Seventh Circuit are reported in *U. S. v. Molasky*, 118 F. (2d) 128.

QUESTIONS PRESENTED

The Government's contention is that the principal question presented is whether there is a sufficiently definite standard of guilt for the jury to convict if any services at all were rendered. This is contrary to its theory of the case in both the courts below wherein the Government took the position that the question was irrelevant and had no application to the case under the pleadings and the proof. The government so argued in the Circuit Court of Appeals and that court accepted and acted upon that theory.

But if the question whether there is a sufficiently definite standard of guilt for the jury to convict in such a case, may now be raised for the first time by the Government, that question should be answered in the negative.

As we view the case, the principal question involved is the sufficiency of the evidence to support the verdict. If that question should be decided adversely to respondents,¹ there also arise for consideration the questions as to whether (a) there was a failure to prove the charge alleged in the indictment causing a fatal variance between the indictment, the Government's theory of the case and the proof; and (b) whether the jury was properly instructed. These were the questions which were argued by the Government in the trial court and in the Circuit Court of Appeals, not the question now urged for the first time as ground for certiorari.

¹ "Respondents" throughout this Answer is used to refer to James M. Ragen, Sr., Arnold W. Kruse and Lester A. Kruse, the respondents to the Petition for Writs of Certiorari in cases Nos. 974-976. "Defendants" is used to refer to all the individual defendants convicted in the trial court and includes in addition to the respondents, William Molasky and James M. Ragen, Jr., as to whom Petitioner does not seek writs of certiorari.

It is recognized on page 2 of the petition that the last mentioned questions (a) and (b) may be presented by the decision below. In view of the circumstance that they were decided adversely to the Government by the Circuit Court of Appeals, necessarily they are in the case before this court. The question of whether the statute contains a sufficiently definite standard of guilt for the jury to convict if any services at all were rendered, becomes an important question only in the event that it is decided that the evidence was sufficient to support a verdict of guilty, that the jury was properly instructed, and that there was not a failure on the part of the Government to prove the charge alleged in the indictment and the essential facts to support the theory upon which it tried the case and urged conviction in the Courts below.

The question as to whether the statute contains a sufficiently definite standard of guilt was urged by respondents in the Circuit Court of Appeals, but was met by the Government with the contention that it is immaterial whether or not services were rendered, that the sole question is whether profits were distributed as dividends to stockholders, regardless of whether the stockholders rendered services to Consensus for which they might have been paid. The Government throughout has contended that the amounts in question were dividends in their entirety and therefore not deductible, as distinguished from commissions which were deductible. (See opinion of Circuit Court of Appeals, R. 501, 502.)

STATEMENT

The record is voluminous. The evidence, however, was not conflicting. It consisted only of testimony of witnesses called by the Government, one of whom was examined as a court witness, and the exhibits introduced by the Government. The defendants offered no evidence.

The Government's statement is too abbreviated to present a fair picture of the case. A statement of facts sufficiently complete for the purposes of this answer may be found in the opinion of the Circuit Court of Appeals (R. 485), to which we refer without attempting to restate it.

We remark that both the District Court (R. 463) and the Circuit Court of Appeals (R. 500, 503) concluded that the evidence disclosed that respondents in fact had performed services and were entitled to compensation therefor.

REASONS FOR NOT GRANTING CERTIORARI

1. **The question as to whether the statute contains a sufficiently definite standard of guilt relied upon as the reason for certiorari was not urged by the Government in either of the lower courts. It is raised in this court by it for the first time, notwithstanding that under the theory of the case as it was presented by the Government in both courts below that question was immaterial and irrelevant.**

The indictment consists of five counts (R. 2-27). The first four counts charged an attempt to evade taxes of the Consensus Company for the respective years, 1933 to 1936. The taxes which the defendants were charged with having sought to evade were taxes payable only if the deduction for commissions paid to the defendants was disallowed in its entirety and if nothing was due to them

for their services rendered to Consensus. None of these counts contains any direct allegation charging that the deduction for commissions was illegal or why such deduction could not be taken.

The conspiracy count covered all the years 1929 to 1936 and alleged as the sole ground of illegality of the deductions for commissions that the defendants were not employees of Consensus and rendered no services to it, but were, owners of beneficial interest therein and that these sums, in fact, were paid to them as distributions of profits or dividends.

That these commissions were all distributions of profits or dividends to stockholders of Consensus, as distinguished from being in whole or in part compensation for services rendered to it, has been the theme of the Government's case throughout. It was so understood by the Circuit Court of Appeals. That Court said:

"Under the Government's theory, however, it is immaterial and irrelevant as to whether the defendants performed services for which they might have been entitled to compensation or salary. The case was tried and is presented here on that theory. In other words, the Government argues that conceding the defendants rendered services for which they might have been entitled to compensation, yet the disbursements were received as corporation dividends and were, therefore, unlawful deductions." (R. 501)

In fact, this same view is reasserted in footnote 9 on page 15 of the petition. The circumstance that no effort was made by the Government to prove all of the services rendered by the defendants to Consensus and that no testimony was introduced on the subject of the value of their services emphasizes this view.

Faced with the uncontradicted proof that the defendants, in fact, had rendered services for which in the opin-

ion of the trial court and in the opinion of the Circuit Court of Appeals they were entitled to compensation (and which under the statute would be a deductible item to the extent that the amounts paid were reasonable), the government now changes its theory and urges that the case involves a question as to whether respondents may be convicted if the amounts in question represented in part compensation paid for services which was deductible if the remaining portion thereof was not, for the reason that the government is not required to prove an evasion of all the tax charged, but only of a substantial part. And this is done notwithstanding no attempt was made by the government upon the trial to show all of the services performed for Consensus by the defendants or the value of their services.

In the Circuit Court of Appeals the Government in its brief urged:

"First the defendants contend that the alleged commissions representing the distributions of seventy per cent of the company's net profits were deductible expense and they cite the section of the revenue acts which allows deductions for necessary and proper expenses. It is submitted that (1) the question here is not one of the deductibility of commissions paid out by a corporation in the operation of its business but whether these payments of net earnings were 'commissions'." (p. 75)

"On the basis of the foregoing, it is respectfully submitted that there is no issue involved in this case regarding the question of whether commissions may be deducted or whether the payments were reasonable. We cannot repeat too often that there are no questions concerning commissions, because these payments were dividends and were known to be such by the defendants. Likewise it is wholly irrelevant to discuss the question of whether it would be a violation of the Fifth and Sixth Amendments if individuals

were convicted of a crime of deducting unreasonable commissions." (pp. 82, 83)

The same theory was also advanced by the Government in the trial court. (See argument on motion for a directed verdict. R. 459)

The question arising under the Fifth and Sixth Amendments to the Constitution stated in the last mentioned excerpt from the brief as being wholly irrelevant is the question now presented as the ground for *certiorari*. But the Government refused to discuss that question in the Circuit Court of Appeals, ignored the case of *United States v. Cohen Grocery Company*, 255 U. S. 81, and cases of similar import, which had been cited by respondents, and did not refer to or cite any of the other cases mentioned in its petition, nor make the distinction now sought to be made on pages 11 and 12 of its petition between *United States v. Cohen Grocery Company*, 255 U. S. 81, and *Gorin v. United States*, 85 Law. Ed. (Adv. Op.) 356, but was content to rest its case upon the contention that the question was an immaterial one.

If it was intended by the Government to raise a question as to whether respondents could be convicted if only a portion of the commissions were not deductible, on the theory that such commissions were in excess of reasonable compensation for services rendered, it would have been essential for the Government to prove all the services rendered by the defendants for the Consensus Company and the reasonable value thereof. But, as stated by the Circuit Court of Appeals: "There was no proof and no effort by the Government to show that the services disclosed constituted the total of those performed and no effort to show the reasonable value of such services." (R. 500)

The argument of the Government in the Circuit Court of Appeals is thus stated in the opinion below (R. 502):

"The Government in its brief and in oral argument before this Court asserts that the deductions in question must be treated either as dividends in their entirety, and if so as unlawful deductions, or as commissions in their entirety, and therefore properly deducted. In other words, in accordance with this argument there can be no middle ground. We agree with this argument for two reasons: *First, it was directly alleged in the conspiracy count of the indictment and impliedly in the other counts that none of the defendants 'rendered any services to the said corporation.'* Thus the question was directly in issue and the Government had the burden of establishing the affirmative. *Second, it is a serious question whether a prosecution for income tax evasion, founded upon improper deductions, can succeed where the proof is other than that the deductions are improper in their entirety.*" (Italics supplied.)

It will be noted from the foregoing that the case was tried on the theory that none of the defendants to the indictment had rendered services, or, if they had, that that circumstance was immaterial. The second question which the Court suggested in the foregoing quotation from its opinion, was completely ignored by the Government, which was content to rest its whole case upon its argument of the immateriality of the rendition of services to Consensus by the defendants.

We submit that the Government has no right to change its theory from that directly alleged in the fifth count of the indictment, implied in the remaining counts, and upon which the case was tried by it in both the courts below, in favor of a new theory first advanced by it in this court, which it emphatically rejected as a question in the case in the lower Courts and which is unsupported by evidence introduced in the trial court on the subject of

the total of the services performed by the defendants or the value of those services.

If the Government was of the opinion that a decision based upon the *Cohen* case would have had any effect upon the enforcement of the revenue laws, that argument could have been made to the Circuit Court of Appeals. The Government chose not to do so.

2. The application of the Fifth and Sixth Amendments of the Federal Constitution to the case.

While the prosecution was under Section 145(b) of the Revenue Act for willfully attempting to evade income taxes, and Section 88, Title 18 U.S.C.A. for conspiracy to defeat and evade income taxes, the question as to whether any tax was attempted to be evaded is dependent upon Section 23(a) of the Revenue Act, providing that in computing net income there shall be allowed as deductions "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered."

Under the due process provision of the Fifth Amendment and the provision of the Sixth Amendment that the accused shall enjoy the right to be informed of the nature of the accusation against him, all crimes are required to be specifically defined, so that one may know in advance whether an act is within or without the prohibitions of the law. The question of guilt or innocence cannot be left to the whims or fancies of triers of the fact, without definite, ascertainable standards to guide them in their determination. Leaving to the triers of the fact the question of guilt or innocence, depending upon their determination of the reasonableness or unreasonableness of the amount

paid as compensation for services, is contrary to the provisions of the Fifth and Sixth Amendments. *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 98; *Connally v. General Construction Company*, 269 U. S. 385, 391; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221.

The Treasury Regulations on the subject of deductibility of items paid for services³ are no more adequate than the statute in fixing a standard.

The petition seeks to make a distinction between *United States v. Cohen Grocery Co.*, 255 U. S. 81, and this case, on the basis that the statute here involved requires that there be a *willful* attempt at tax evasion (Pet. 11-12). But the statute involved in the *Cohen Grocery Co.* case also required the prohibited action to be willful. That statute made it a criminal offense "wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities", 255 U. S. 85. The statute there involved was held unconstitutional.

In the *Gorin* case, principally relied upon by the Government, *United States v. Cohen Grocery Co.* was referred to with apparent approval. The two cases (*United States v. Cohen Grocery Co.* and *Gorin v. United States*) are but two of the many cases decided by this Court determining on which side of the line falls a statute, the constitutionality of which is challenged on the ground that it does not provide a sufficiently definite standard of guilt.

In Note 12 of the *Gorin* case (85 L. Ed. Adv. Op. 361) several references are made to criminal statutes which were held to be too vague, and consequently falling on one side of the line, and in Note 13 on the same page ref-

³ These are set forth in the Appendix to this Answer. The excerpts from the Treasury Regulations copied in the Appendix to the Petition do not give all the pertinent provisions on this subject.

ferences are made to other criminal statutes held to adequately define the crimes, and consequently falling on the other side of the line. We submit that the statute in this case, if construed as the Government seeks to have it construed, is within the former category, and that it is closer to the statute held unconstitutional in *United States v. Cohen Grocery Co.* than the statute involved in any of the other cases cited.

The Government stresses the necessity of the element of wilfulness in order that there be a successful prosecution under Section 145(b). But there must also be tax evasion. In a case such as this, whether there is tax evasion depends upon the judgment of the triers of the fact as to the reasonableness of the compensation paid, without any standard laid down by the statute for determining that question.

The sufficiency of the statutes here in question to define an adequate standard of guilt was not raised or discussed in *United States v. Kelly*, 105 F. (2d) 912. Several of the items for which deductions were taken in that case were fabricated. *U. S. v. Zimmerman*, 108 F. (2d) 370, does not pass upon any such question. There is, therefore, no conflict between decisions of Circuit Courts of Appeal on this subject.

The question here is not whether the Government is required to prove an evasion of all the tax charged, but whether it must prove an actual evasion of some part of the tax, the determination of which can be made by reference to a standard sufficiently definite to meet constitutional requirements.

Regardless of the question as to whether the statutes here involved contain a sufficiently adequate standard of guilt, we submit that the Circuit Court of Appeals was right in reversing the judgment, because a verdict for

respondents should have been directed and because of error in instructing the jury. These questions will be briefly discussed below.

3. A verdict for respondents should have been directed.

The Government indicates in its petition that the Circuit Court of Appeals reversed "because it did not think the evidence sufficient to support the verdict" (Pet. 10). That is our view. The trial judge also indicated he would have directed a verdict for respondents if the Government had the right of appeal. (R. 464-466)

The Circuit Court of Appeals in its opinion said it is "our conviction derived from a study of the record that the Government's case is not strongly supported. In fact we agree with the District Judge when he said in denying the motions for directed verdict: 'I admit that I think this is a pretty weak case.' " (R. 499)

Whether a verdict should have been directed for respondents or not requires a review of the evidence and the inferences to be drawn therefrom. In *General Talking Pictures Co. v. Western Electric Co.*, 304 U. S. 175, 178, it was said that the "Granting of the writ would not be warranted merely to review the evidence or the inferences drawn from it."

The Circuit Court of Appeals from the undisputed evidence concluded that although there was evidence to support the Government's contention that respondents were owners of stock of Consensus, the undisputed evidence also showed the following facts: (a) the respondents rendered services to Consensus (R. 500, 503); (b) there was evidence of an express agreement that they were to be compensated on the commission basis actually used to pay them for such services (R. 500); (c) regardless of whether that agreement was made or not the law

would imply an agreement to pay them reasonable compensation (R. 500); (d) the Government did not attempt to prove the total of the services rendered by them or the value of their services (R. 500); (e) that the indictment was based and the case was tried upon the theory that respondents rendered no services to Consensus. (R. 500, 592) Such being the case, we submit a verdict should properly have been directed for respondents.

4. Error in instructing the jury.

The portion of the charge objected to by respondents is set forth on pages 8 and 9 of the petition. There was no conflict in the evidence as to the profits of Consensus before paying commissions to the defendants nor regarding the amount of commissions so paid. If the Government's theory of the case, that it is immaterial whether the defendants rendered services or not, is sound, there was no occasion for such a charge as that excepted to.

There was no proof in the case from which the jury could determine the reasonable value of the defendants' services. We submit the excepted portion of the charge only could be construed by the jury as authorizing them to determine whether any portion of the sums paid to the defendants as commissions represented a distribution of profits, because in the opinion of the jury the amounts paid were unreasonably large as compensation for the services shown to have been rendered, and this without evidence upon which the jury could come to a conclusion upon that subject.

The observations in the footnote on page 11 of the petition, that the jury might have found that in some years one or more of the defendants rendered no services, or that as to some of the defendants some or all of the payments were profits in their entirety, is unsupported by

any evidence upon these questions upon which the jury could have made a finding. Consequently, any verdict of the jury upon any such issue would have been one based upon conjecture and surmise, not evidence.

CONCLUSION.

It is respectfully submitted that the petition should be denied.

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MATTHIAS CONCANNON,

SIDNEY R. ZATZ,

Of Counsel.

APPENDIX.

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 126. *Compensation for personal services.* Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows:

(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. (a) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services, and the excessive payments correspond or bear a close relationship to the stockholdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock. * * *

(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. Generally speaking, if contingent compensation is paid pursuant to a free bargain between the employer and the individual made before the services are rendered, not influenced by any consideration on the part of the employer other than that of securing on fair and advantageous terms the services of the individual, it should be allowed as a deduction even though

in the actual working out of the contract it may prove to be greater than the amount which would ordinarily be paid.

(3) In any event the allowance for the compensation paid may not exceed what is reasonable in all the circumstances. It is in general just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises in like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned.

ART. 127. *Treatment of excessive compensation.*—The income tax liability of the recipient in respect of an amount ostensibly paid to him as compensation, but not allowed to be deducted as such by the payor, will depend upon the circumstances of each case. Thus, in the case of excessive payments by corporations, if such payments correspond or bear a close relationship to stockholdings, and are found to be a distribution of earnings or profits, the excessive payments will be treated as a dividend, and will thus be exempt from the normal tax in the hands of the recipient. * * *

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

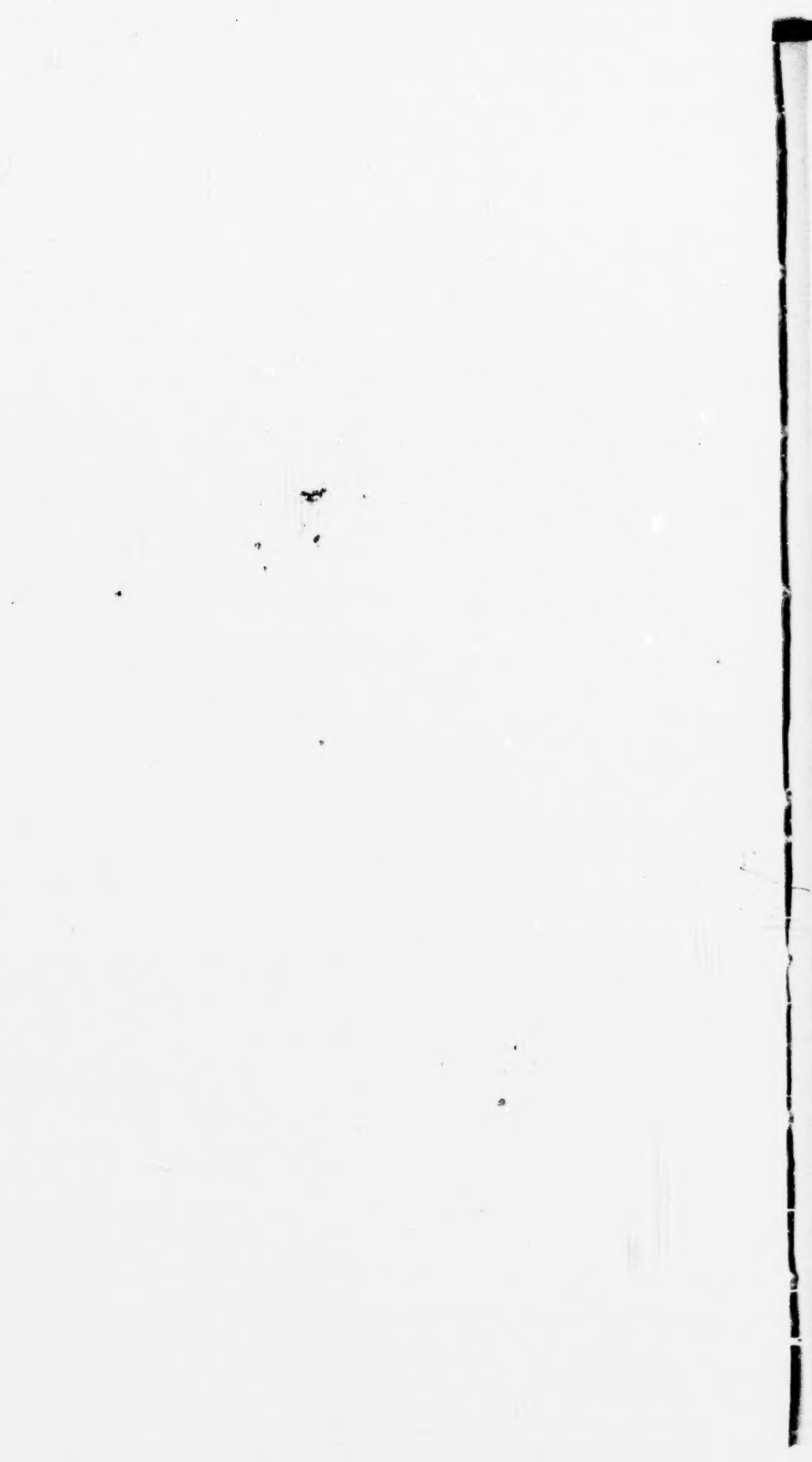
Article 23(a)-6 is identical with Article 126 of Treasury Regulations 77 above quoted, except that in sub-section 3 the words "under all the circumstances" are used instead of the words "in all the circumstances" and the words "under like circumstances" are used instead of the words "in like circumstances".

Article 23(a)-7 is identical with Article 127 of Treasury Regulations 77 above quoted.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

Article 23(a)-6 is identical with Article 23(a)-6 of Treasury Regulations 86.

Article 23(a)-7 is identical with Article 127 of Treasury Regulations 77 above quoted, except for the omission from Article 23(a)-7 of Regulations 94 of the following phrase from the end of the second sentence: "and will thus be exempt from the normal tax in the hands of the recipient."



Office - Supreme Court, U. S.

NO. 18

CHARLES CLARK COPY

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 54

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

JAMES M. RAGEN,

Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT, JAMES M. RAGEN.

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MATTHIAS CONCANNON,

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INDEX.

| | PAGE |
|--|------|
| Questions presented | 1 |
| Statement | 3 |
| Summary of Argument | 17 |
| Argument | |
| I. The Circuit Court of Appeals correctly held that the evidence was insufficient to support a verdict of guilty | 21 |
| A. The evidence is insufficient to sustain a guilty verdict against Ragen, Sr. upon the first four counts of the indictment | 22 |
| B. The evidence is insufficient to sustain the verdict against Ragen, Sr. upon the fifth count of the indictment | 23 |
| 1) Commissions or percentages of net profits of a corporation paid for services rendered are deductible in computing taxable income | 25 |
| 2) The fifth count charges that no services were rendered by defendants to Consensus. The evidence shows that services were rendered by them. A verdict should have been directed, because the charge was not proved as alleged | 27 |
| 3) There was no showing as to the total of all services rendered by the defendants to Consensus or the reasonable value of those services. Even if the question of compensation were an issue in the case, a verdict should have been directed, because the evidence was insufficient to warrant the submission of that question to a jury | 30 |

- 4) Knowledge of the conspiracy is essential in order to charge one as a party thereto, notwithstanding he may have done some act in furtherance of the object of the conspiracy 32
- 5) In a prosecution for a wilful attempt to defeat and evade taxes it is not sufficient to show merely that a lesser tax was paid than was due. It is essential to prove that the acts complained of were wilfully done in bad faith and with evil intent to evade and defeat the tax 32
- 6) The evidence does not show that Ragen, Sr. had any knowledge of the alleged conspiracy and does not show that he did any act in bad faith or with evil intent in an attempt to evade or defeat payment of Consensus income taxes 33

II. The question as to whether there is a sufficient definite standard of guilt for the jury, to convict, if defendants rendered any services to Consensus, is raised by the Government for the first time in this court. In the courts below the Government contended that question was irrelevant. The Government should not be permitted to shift its position 40

III. To permit a conviction to rest upon the determination by a jury of the reasonableness of the compensation paid for services rendered, without a definite standard for determination of that question, prescribed by statute or regulation, would be contrary to the due process clause of the fifth amendment and the provision of the sixth amendment that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation 45

IV. The Government failed to prove the charge made in the indictment. There is error in

| | PAGE |
|---|------|
| the charge to the jury. The exception thereto was sufficient | 53 |
| Conclusion | 55 |
| Appendix | 57 |

CITATIONS.

Cases:

| | |
|--|----------------|
| American Machine Co. v. Kentucky, 236 U. S. 660, 661 | 46 |
| Austin v. United States, (C. C. A. 5) 28 F. (2d) 677, 678 | 26, 39, 40, 48 |
| Champlain Refining Co. v. Commission, 286 U. S. 210, 242 | 46 |
| Collins v. Kentucky, 234 U. S. 634, 638 | 46 |
| Connally v. General Construction Co., 269 U. S. 385, 391 | 46, 50 |
| Crawford v. United States, 212 U. S. 183, 194 | 54 |
| Dahly v. United States, (C. C. A. 8) 50 F. (2d) 37, 43 | 35 |
| Davidson v. United States (C. C. A. 8) 61 F. (2d) 250, 253 | 35, 36 |
| Gorin v. United States, 312 U. S. 19 | 49 |
| Guzik v. United States, (C. C. A. 7) 54 F. (2d) 618 | 36 |
| Helvering v. Wood, 309 U. S. 344, 349 | 44 |
| Herndon v. Lowry, 301 U. S. 242, 262-264 | 46 |
| Hendrey v. United States, (C. C. A. 6) 233 F. 5, 18.... | 36 |
| International Harvester Co. v. Kentucky, 234 U. S. 216, 221 | 46 |
| Kassin v. United States, (C. C. A. 5) 87 F. (2d) 183, 184 | 36 |

CITATIONS.

Cases (continued):

| | |
|---|------------------------|
| Lamento v. United States, (C. C. A. 8) 4 F. (2d) 901, 904 | 55 |
| Langer v. United States, (C. C. A. 8) 76 F. (2d) 817, 827 | 36 |
| Lanzetta v. New Jersey, 306 U. S. 451, 453 | 46 |
| Meadows v. United States, (Ct. App. D. C.) 82 F. (2d) 881 | 55 |
| Nicola v. United States, (C. C. A. 3) 72 F. (2d) 780, 782 | 14, 35 |
| Nosowitz v. United States, (C. C. A. 2) 282 F. 575, 578 | 36 |
| Paddock v. United States, (C. C. A. 9) 79 F. (2d) 872, 876 | 36 |
| Ridenour v. United States, (C. C. A. 3) 14 F. (2d) 888, 892 | 36 |
| Small Co. v. American Refining Co., 267 U. S. 233, 238 | 46 |
| Smith v. Cahoon, 283 U. S. 553, 564 | 46 |
| Tingle v. United States, (C. C. A. 8) 38 F. (2d) 573, 575 | 36 |
| Towbin v. United States, (C. C. A. 10) 93 F. (2d) 861, 867 | 36 |
| United States v. Cohen Grocery Co., 255 U. S. 81, 89 | 43, 46, 47, 48, 49, 50 |
| United States v. Falcone, 311 U. S. 205, 210 | 32, 34 |
| United States v. Murdock, 290 U. S. 389, 397 | 32, 40 |
| United States v. Pennsylvania Railroad Co., 242 U. S. 208, 237 | 46 |

CITATIONS.

Cases (continued):

| | |
|--|------------|
| Weems v. United States, 217 U. S. 349, 362 | 54 |
| Weniger v. United States, (C. C. A. 9) 47 F. (2d) 692, 693 | 35 |
| Wiborg v. United States, 163 U. S. 632, 658 | 54 |
| William S. Gray & Co. v. United States, (Court of Claims) 35 F. (2d) 968, 974 | 26, 48, 49 |

Statutes:

| | |
|--|------------|
| Internal Revenue Code Sec. 23 (a) | 26, 51 |
| Internal Revenue Code Sec. 145 (b) | 45, 46, 51 |
| Revenue Act of 1928, Sec. 23 (a) | 26 |
| Revenue Act of 1932, 47 Stat. 167, Sec. 23 (a) | 26 |
| Revenue Act of 1934, 48 Stat. 680 | 26 |
| Sec. 23 (a) | 26 |
| Sec. 25 (a)· (1) | 14 |
| Revenue Act of 1936, 49 Stat. 680, Sec. 23 (a) | 26 |

Miscellaneous:

| | |
|--|----------------|
| Treasury Regulations, 74, Art. 126 | 26, 31, 46, 57 |
| Treasury Regulations, 77, Art. 126 | 26, 31, 46, 58 |
| Treasury Regulations, 86, Art. 23 (a)-6..... | 26, 31, 46, 58 |
| Treasury Regulations, 94, Art. 23(a)-6..... | 26, 31, 46, 58 |



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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
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BRIEF FOR RESPONDENT, JAMES M. RAGEN.

QUESTIONS PRESENTED.

The principal question presented is the correctness of the conclusion of the Circuit Court of Appeals that the evidence is insufficient to support the verdict of guilty. This involves a consideration of the undisputed evidence offered by the Government including whether there was a failure to prove the charges alleged in the indictment and to support the theory upon which the case was tried by the Government in both courts below.

The evidence does not show that respondent,¹ Ragen, Sr., had any knowledge of or participated in any attempt to evade taxes of Consensus Publishing Company for any of the years charged in the substantive counts of the indictment and there is no evidence that he was connected in any way with a conspiracy to evade taxes as charged in the fifth count. The evidence fails to show that he had anything to do with or knew anything about the books of Consensus, its income tax returns, or its income tax matters, or that he knew of any conspiracy or agreement to evade its income taxes, if any such conspiracy existed.

The Government itself proved the falsity of the charge that the defendants had performed no services for Consensus. It was upon the theory that they had performed no services that the case was tried and argued in the lower courts. The hypothesis that the sums paid to defendants by Consensus might be found to be in excess of reasonable compensation for their services, and that to the extent of the excess paid and for which deductions were taken in its income tax returns, there was tax evasion, is not properly in issue under the indictment or the theory upon which the case was tried and argued below. That, moreover, was not a proper subject of inquiry by a jury since there is no sufficiently definite standard of guilt to meet constitutional requirements. It would also be necessary, in order to determine whether the compensation paid was unreasonable for evidence to be produced showing the total of the services rendered and the value thereof. The

¹ Throughout this brief the word "respondent" is used to refer to James M. Ragen, Sr., respondent in Case 54. The term "Defendants" is used to refer to all the individual defendants convicted in the trial court and includes Arnold W. Kruse, Lester A. Kruse, and also William Molasky and James M. Ragen, Jr. The Government has not sought writs of certiorari to review the reversal of the convictions of Molasky and Ragen, Jr.

Government failed to offer such evidence. The issue would not be changed if the defendants were stockholders. Whether they were or not, the payments made could be held to be dividends only in the amount in excess of reasonable compensation for the services rendered. The court erred therefore in submitting any such question to the jury and in its charge to the jury.

As the Government urged below that the constitutional question was not involved in the case, and removed it as a controversial question by its argument that the payments either were all dividends or all commissions, the Government may not now shift its position and urge that the question is in the case.

STATEMENT.

Indictment. The indictment is in five counts (R. 2-27). The first four counts charge the defendants jointly with wilful attempts to defeat and evade income taxes of Consensus Publishing Company, a corporation (hereinafter sometimes referred to as "Consensus"), for the years 1933 to 1936, inclusive. The fifth count charges conspiracy to commit such an offense for the years 1929 to 1936, inclusive. There are questions connected with the construction of the charges made in the indictment which will be later considered in this brief.

Evidence. The Government's statement of facts is not and does not purport to be complete. Its brief (p. 4) states that it is a summary of the evidence "supporting the verdict of the jury." A fairer statement is contained in the opinion of the Circuit Court of Appeals (R. 497).

However, we find it necessary to give a more complete statement than will be found either in the Government's brief or the opinion of the Circuit Court of Appeals, in

view of our contention that a verdict should have been directed for this respondent.

Although the record is voluminous, the evidence is not conflicting. It consists only of the testimony of witnesses called by the Government, one of whom was examined as a court witness, and certain documentary evidence offered by the Government. The defendants offered no evidence.

Organization and business of the company. In September, 1929, at the suggestion of Moses L. Annenberg, who was one of the parties indicted but as to whom the indictment was dismissed, it was agreed that Moses L. Annenberg, Arnold W. Kruse, James M. Ragen, Sr., and William Molasky would take over and operate the business of printing and distributing a card known as a run-down sheet, which prior thereto had been distributed in St. Louis by Molasky and one Zweig (R. 319). At this meeting Annenberg said he would own the business and would be entitled to 30%, Molasky was to do the work at St. Louis, and was to be entitled to 30%, and Arnold W. Kruse and James M. Ragen, Sr. were to get 20% each for services to be rendered (R. 392, 416). Kruse and Ragen, Sr. then were employed by or associated with certain corporations in which Annenberg's Cecelia Investment Co. was interested (R. 392).

On September 18, 1929, an Illinois corporation known as the Consensus Publishing Company was organized. One hundred shares of its stock of the par value of \$5,000 were subscribed for and issued as follows:

| | |
|----------------------|---------------------|
| Howard Clark | 20 shares |
| Thomas Ryan | 20 shares |
| William Molasky..... | 30 shares |
| Jules Taylor..... | 30 shares (Ex. 67). |

There is no evidence as to how this capital stock was paid for or by whom.

Payments of commissions by Consensus. From the time of its incorporation the earnings of Consensus were distributed weekly by checks as follows:

As *dividends*, 30% to Cecelia Investment Company which was a holding company for the stock of some seventy-five corporations owned by Annenberg, referred to sometimes as the Annenberg companies (R. 426-429);

As *commissions*, 30% to William Molasky, of which one-half or 15% was paid to B. Hoffman, in the years 1933 to 1936 (R. 426-429);

20% to Ragen, Sr. from October, 1929, until March 19, 1931 and 20% to Ragen, Jr. from April 3, 1931, through 1936 (R. 426-429);

20% to A. W. Kruse for the years 1929 up to and including August 4, 1932; 20% to Mrs. A. W. Kruse from August 11, 1932 to and including March 16, 1933; 20% to Lester A. Kruse from March 23, 1933 to and including 1936 (R. 426-429).

The books of account of Consensus were kept in the Chicago accounting office of the Annenberg Companies under the supervision of Arnold W. Kruse (R. 322, 323). Collections made by Molasky were deposited by him in the corporation's bank account in St. Louis (R. 323, 338). Every week he sent the Chicago office a statement of the collections and expenses and a check was issued to him each week for the previous week's expenses (R. 338, 411, W R Govt. Exhibits). Entries reflecting the above payments to defendants as "commissions" and to Cecelia as "dividends" were made in all of the books of account of the company (R. 328, 429). From 1929 and during the entire period, including 1937, in all of the income tax returns filed by the Company, deductions were taken from gross income for these commissions, under the item "Commissions" in the amounts specified in the indictment (R.

429). In some instances on work sheets prepared by one of the four bookkeepers for his own convenience in computation and making entries in the books and in weekly reports copied therefrom sent to the defendants the item "commissions" was called "dividends" (R. 334-338). The bookkeeper who made the work sheets testified the failure to add "and commissions" on his work sheets was neglect (R. 418). The other bookkeepers generally listed the commission payments under "commissions" on their work sheets (R. 337, 340, 348).

Services rendered by defendants. Prior to the organization of Consensus the business was confined to St. Louis. After its organization under the new management of the defendants the business spread to Cincinnati, Lexington, East St. Louis, Dayton, Columbus, Kansas City and other cities (R. 354, 365). Run-down sheets were printed in St. Louis and Cincinnati (R. 355). The principal business office was in Chicago. The books of Consensus were kept in another Chicago office, the Annenberg companies' accounting office, under the supervision of Arnold W. Kruse (R. 392). Molasky, Arnold W. Kruse, Ragen, Sr. and later Ragen, Jr. worked for the Company (R. 388, 387). Ragen, Sr. had his office in another place in Chicago (R. 385, 392). Molasky was in charge of the operations of the Company at St. Louis (R. 323, 354). Arnold W. Kruse and the two Ragens were consulted frequently by Molasky concerning business policies, and they, with Molasky, managed the operations of the Company (R. 385, 392). Molasky traveled extensively on the Company's business (R. 354, 355). In Molasky's absences, which were frequent, Arnold W. Kruse, Lester Kruse or one of the Ragens would be consulted by the St. Louis office for instructions and about customers and their orders (R. 354, 355). Ragen, Sr. was originally head of the General News Service which furnished news service to bookmakers (R.

392). Ragen, Jr. subsequently was in charge thereof (R. 394). Arnold W. Kruse was head of the Racing Form, a racing publication (R. 392). These concerns were Annenberg companies (R. 321, 392). Ragen, Sr., later Ragen, Jr., and Arnold W. Kruse were in a position to obtain run-down business from their customers. That they did so is shown by the fact that Brooks of St. Louis called upon them from time to time to assist in inducing Consensus' customers to restore orders for run-down sheets that had been reduced (R. 355). The run-down business had been unprofitable prior to the time of its operation by Consensus. Thereafter sales increased (R. 392), and the business, as shown by its income tax returns, became highly profitable (R. 21).

After Ragen and Arnold W. Kruse came into the business a number for each horse entered in races was put on the Consensus run-down sheets (R. 393). In transmitting news the General News Service used these numbers instead of the names of the horses, thereby correlating the News Service with Consensus run-down sheets. General News Service delivered the run-down sheets (R. 393).

The run-down sheet business, as conducted by Consensus, was not as simple as the Government's presentation would lead one to conclude. Much of the statement on this subject contained in the Government's brief is taken from Zweig's testimony. He relates circumstances connected with the operation of the business as conducted in St. Louis by him or by him and Molasky before the Consensus Company entered the business (R. 321). That testimony is not of much weight as to the operations of the business after his connection with it ceased. The remainder of the Government's statement on this subject is based upon Brooks' testimony. Brooks was familiar with the printing of the sheets in St. Louis, but knew nothing about the other operations of the business (R. 354-355). The indictment alleges (R. 21)

that Consensus was entitled to admitted deductions at the rate of approximately \$40,000.00 per year for expenses during the period in question. These amounts are exclusive of the commission items. In addition, it appears that in some instances services were rendered to Consensus by employees such as Brooks, whose services were not charged as an expense to Consensus but to other enterprises conducted by some of the defendants (R. 352). This was probably true also regarding the expenses of maintaining the Chicago office of Consensus, as it appears from the evidence that the only deductions taken were those paid out by Molasky in St. Louis and remitted to him weekly (R. 323-324).

On this subject, the Circuit Court of Appeals in its opinion said (R. 500):

"It does not require a great deal of proof to be convincing that the executives, managers, and employees of a corporation which earned a gross income of \$119,960.96 for the year 1933 (in some years the income was much greater) rendered services and were reasonably entitled to substantial salaries. In 1929, Consensus took over a business—if it can be thus dignified—that was a losing proposition, and made it a financial success. So far as is disclosed by this record, these defendants alone were responsible for that success. According to the Government's theory, no executive ability was displayed and no service rendered for which the defendants were entitled to compensation or salary. Such a theory is incredible."

The indictment shows the Company paid substantial sums for salaries and wages each year (R. 5, 9, 12, 16). None of the witnesses who testified were paid any salaries by Consensus although many performed bookkeeping or legal services for it (R. 321, 339, 352, 357, 371, 421). It

is evident that various other persons worked for Consensus under the defendants, and otherwise came in contact with the defendants who could have testified as to the work the defendants did. Such witnesses were not called by the Government.

No attempt was made to show that the services testified to were the only services rendered by the individual defendants. There was no evidence offered as to the reasonable value of the services rendered by the individual defendants. No compensation for their services was paid except the commissions above mentioned.

History of stock certificates, corporate records, and employment contracts. For many years the minute-books and stock records of the seventy-five or more Annenberg companies had been neglected (R. 389). Minutes had not been written. Stock in these companies owned by the Cecelia Company, Annenberg's holding company, in many instances was outstanding in the names of dummies (R. 386, 387). In 1933 the corporate records were moved from New York to Chicago and Herbert Kamin, one of the parties indicted but dismissed before trial, who was an attorney, and whose wife was a relative of Annenberg, was employed to put the records in order and to take care of them, to bring the minutes up to date, prepare missing minutes, and see that stock outstanding in the names of others was put into the name of the Cecelia Company (R. 386-387). Kamin received instructions and information on this subject from Arnold W. Kruse (R. 371). Kamin commenced work on the Consensus records in the summer of 1934 (R. 390). No minutes for that Company had been drawn up since 1929. Its stock had been issued in the names of dummies (R. 387).

The original stock certificates had been issued in the names of the subscribers, in accordance with the Articles of Incorporation (R. 386). Transfers thereof had been

made, 30 shares from Taylor to the Cecelia Company in 1929; 15 shares from Molasky to B. Hoffman in 1933; 20 shares from Clark to Kamin in 1935. The certificate made in connection with the last mentioned transfer was delivered to Arnold W. Kruse (R. 375, 377).

In 1934 Arnold W. Kruse told Kamin of the meeting between M. L. Annenberg, Arnold W. Kruse, Ragen, Sr. and Molasky in 1929 and of the agreement then made that the Cecelia Company was to own all the stock of Consensus, and that Arnold W. Kruse, Ragen and Molasky were to get percentages of the profits as commissions for their services, that the stock of Consensus had been issued incorrectly, that Cecelia owned all the stock from the beginning, that the persons who held the stock were not the real owners but were incorrectly holding the stock, and that he wanted a new stock book showing such ownership, and requested Kamin to have the records reflect what had occurred, in a proper and legal manner (R. 374-375, 387-392).

In August, 1934, Kamin prepared a new stock book for 'Consensus, issuing new certificates to the four original subscribers and transferring them to one certificate for 100 shares in the name of Cecelia Company, all dated back to 1929, the time of incorporation (R. 377). Kamin sent the new certificates to Molasky to sign as President of the corporation and to endorse the certificate for 30 shares made out in Molasky's name as a subscriber and return them (R. 377, Ex. 200). Molasky did so (R. 377).

Some time later in 1934, Kamin prepared minutes of previous stockholders' and directors' meetings (R. 383) and in 1934, 1935, or 1936, prepared yearly employment contracts from 1930 (R. 378, 381, 382), the compensation specified in which corresponded with the commission pay-

ments theretofore paid the defendants as reflected by the books of the Company (R. 381, Ex. 82). Thereafter, employment contracts were made annually until 1938, which were authorized by the Board of Directors (R. 384, 393). In 1938 contracts with Molasky, Arnold W. Kruse and Ragen, Jr. for a ten-year period were executed and guaranteed by the Cecelia Company (R. 393, Ex. 102, 104, 106).

James M. Ragen, Sr. executed an assignment of the above employment contract for 1931 to his son, James M. Ragen, Jr. (Ex. 80, R. 381). Arnold W. Kruse executed an assignment of the above employment contract for 1932 to his son, Lester A. Kruse (Ex. 83, R. 382).

Kamin procured signatures for the minutes, employment contracts, assignments and new stock certificates (R. 379, 384, 398). The original stock certificates remained outstanding until 1938 (R. 384). Two stock books were in existence from 1934 to 1935 (R. 379). In 1938, after the ten-year employment contracts had been made, the original certificates were destroyed (R. 384, 385, 393). In 1934, a certificate for 100 shares of Consensus stock was issued to the Cecelia Company and some time thereafter was delivered to Annenberg (R. 377). The original certificate for 30 shares issued to the Cecelia Company was returned and cancelled. About a year after the new certificates were made out (R. 380), Kamin destroyed the original stock certificate book. Kamin drew new certificates, which were dated back, and minutes which were dated back, in some fifty corporations, in addition to similar work on Consensus (R. 396, 397).

There is no evidence that Ragen, Sr. ever owned or had in his possession any of the stock certificates issued by Consensus. There was received in evidence a sheet of paper dated October 28, 1929, captioned "Consensus Publishing

Company" (Ex. 29 C R 1, R. 333), which purported to be a list of officers and directors, on which the following appears:

| "Stockholders (actual) | Number of Shares | Dummy |
|----------------------------|---------------------|--------------|
| William Molasky | 30 | None |
| Cecelia Investment Co..... | 30 | None |
| A. W. Kruse..... | 20 | Howard Clark |
| J. M. Ragen..... | 20 | Thomas Ryan |

The paper bears no signature. It was among documents delivered to the Government under a grand jury subpoena issued to the Consensus Publishing Company. There is no evidence by whom, under whose direction or when the document was written.

Kamin received a Consensus certificate for 20 shares from Ragen, Jr. in 1938, which was then destroyed (R.385). Kamin did not look at the face of the certificate, did not know to whom it was issued, nor whether it was issued to Thomas Ryan. He never saw a certificate issued in the name of Ryan, having Ryan's endorsement, or in the name of Ragen, Sr. or his son. He had no knowledge of whether Ragen, Sr. was the owner of or held any stock. He only knew that Ragen, Jr. gave him a stock certificate in 1938 (R. 390). There is no evidence that any of the defendants paid anything for Consensus stock.

Income tax returns. The income tax returns of Consensus for 1929 to 1937, inclusive, were received in evidence (Exs. 1-9). In all of them the commission payments were deducted from gross income and the items thereof were specifically designated on the returns as commissions. The payments to the Cecelia Company were noted in the returns as dividends. None of these returns was signed by Ragen, Sr. (See Exs. 1-9). The income tax returns for 1931 and 1932 (Exs. 3 and 4) were audited

by the Bureau of Internal Revenue and additional taxes in small amounts were assessed in January, 1934, and January, 1935 (R. 316-318). Deductions for commissions do not appear to have been questioned in these audits.

The income tax returns of Ragen, Sr. for 1929 to 1937, inclusive, were received in evidence (Gov. Exs. 30-38). The items paid to him by Consensus Publishing Company were included in his personal income tax returns as commissions (Exs. 29, 30, 31). The individual income tax returns of other defendants were also introduced in evidence (Exs. 19 to 25, 26, 29, 27A, 39 to 44, 46 to 58). The other defendants to whom commissions were paid included them in their personal income tax returns as commissions; with the exception that Molasky reported them as dividends in his returns for 1933, 1934 and 1935 (Exs. 50, 51, 52).

*Evidence showing connection of Ragen, Sr. with transactions disclosed by evidence.*² We set forth below the only evidence connecting Ragen, Sr. with the transactions disclosed by the evidence.

Ragen, Sr. was present at the original meeting with Annenberg in 1929. Under the agreement then made, he was to receive 20% of the net earnings of the run-down sheet business (R. 416). He received this amount weekly until March 19, 1931 (R. 426). Thereafter his son, Ragen, Jr., who was connected with the business of General News Bureau (R. 426), received the like percentage, and Ragen, Sr. received nothing further from the above source (R. 426).

² It is to be noted that this brief is filed only on behalf of James M. Ragen, who is sometimes referred to as James M. Ragen, Sr. His son, James M. Ragen, Jr., also was a defendant. He was convicted and fined. His conviction was reversed by the Circuit Court of Appeals and the Government has not sought to review that judgment of reversal.

There is nothing to show that Ragen, Sr. was a stockholder of Consensus, paid anything for stock of that corporation, or ever had any stock certificate thereof in his possession, or knew that he was entitled to any stock thereof, except for the unauthenticated Exhibit 29 C R 1 (R. 333), and whatever inference may be drawn from the circumstance that in 1938 his son, Ragen, Jr., was in possession of a stock certificate of Consensus as hereinabove recited. (The above Exhibit 29CR1 has no evidentiary value *Nicola v. U. S.* (C.C.A. 3) 72 F. (2d) 780, 782.) There is nothing to show that Ragen, Sr. knew anything about the destruction of the original stock book or stock certificates of Consensus or the writing of new certificates for stock of that Company.

While the copies of the bookkeeper's work sheets which were sent to Ragen, Sr. listed the commission items under "dividends" (R. 338), the books of Consensus showed the amounts paid to him as commissions. He returned the items paid to him as commissions in his personal income tax returns, thus paying a greater personal income tax thereon than if he had returned them as dividends.³

Ragen, Sr. rendered services as above shown to Consensus during the period he received these commissions. The Government, on page 12 of its brief, refers to the testimony of Burris to show that Ragen, Sr. did no work for Consensus. Burris, however, was not in the employ of any of the Annenberg companies until 1933 (R. 339), which was long after the date when Ragen, Sr. ceased to receive commissions from Consensus. The witnesses called by the Government other than Brooks, had nothing to do

³ Prior to the effective date of the Revenue Act of 1936, dividends paid to an individual were not subject to normal taxes but only to surtaxes. Commissions were subject to both normal and surtaxes. See Revenue Act of 1934, 48 Stat. 680, C. 277 § 25(a)(1).

with the operations of Consensus during the period for which Ragen, Sr. received commissions (R. 322, 339, 347, 357, 371, 411). The Government refers to the testimony of Brooks as disproving the rendition of services by Ragen, Sr. Brooks, however, worked only at the St. Louis office (R. 50). Ragen's office was in Chicago (R. 392). Brooks would not be in a position to know what services Ragen, Sr. performed in Chicago. Brooks did testify, however, that he had talked to Ragen, Sr. on the telephone regarding the business and policies of Consensus at various times (R. 355). None of the other witnesses gave evidence as to the character or extent of the services of Ragen, Sr.

Ragen, Sr. was never an officer or director of Consensus. He signed no contracts, except the employment contracts in which he was named as an employee for the years 1930 and 1931, and the assignment of the 1931 contract to his son. These were prepared by Kamin, attorney for the company, and handed to Ragen, Sr. for signature. Ragen, Sr. did not sign any minutes of any meeting of stockholders or directors. He did not attend any stockholders' meeting. He did not execute a proxy for any stockholders' meeting.

While the Government contends that Arnold W. Kruse instructed Kamin to prepare written employment contracts, to obtain the signatures of the parties thereto, and to draw up new stock certificates, after learning about some Board of Tax Appeals decision, there is no evidence that Ragen, Sr. knew anything about that decision or that the signing of the written employment contracts had any connection with income taxes. He was asked to sign them by Kamin and did so. So far as Ragen, Sr. was concerned the employment contracts merely reflected what had actually happened. He understood he was to receive 20% of the net earnings for his services from the time of the taking over of the run-down sheet business in 1929 until March 19, 1931, when he ceased to have any

further interest in the matter. He had received those payments and had filed his personal income tax returns including them in a manner making them fully taxable to himself. There was no reason for his not acceding to the request of his employer's lawyer to sign them and he did so.

No income tax return of Consensus was signed or filed by Ragen, Sr. (Ex. 1-9). He was not consulted in regard to the preparation of any such return. There is nothing to show that he knew the contents of any of those returns or the basis upon which they were made.

SUMMARY OF ARGUMENT.

I.

The evidence is insufficient to support the verdict of guilty against Ragen, Sr. There was no evidence connecting him with any of the charges in the first four counts of the indictment alleging that defendants wilfully attempted to evade income taxes imposed upon Consensus for the years 1933 to 1936 by filing tax returns claiming deductions for commissions in those years. He had ceased to receive commission payments in March, 1931. He had nothing to do with the preparation or filing of any of the income tax returns in question, did not know the contents thereof or the deductions taken therein. A verdict should therefore have been directed for Ragen upon the first four counts.

As to him the evidence was also insufficient to sustain the verdict upon the fifth count of the indictment and a verdict of not guilty under that count should have been directed, for the following reasons:

(a) Commissions or percentages of net profits or earnings of a corporation may be paid by it for services rendered, and to the extent that they are reasonable in amount are deductible in computing taxable income. It appears from the evidence that the commissions were paid as compensation for services rendered. It is unimportant whether the defendants to whom the commissions were paid were stockholders or not. In either event, they were entitled to compensation for their services, and to the extent such compensation was reasonable it could properly be deducted.

(b) The fifth count charged that the defendants did not in fact render services to Consensus and consequently the deductions therefor in its income tax returns were unlawful. The evidence shows services were rendered. There was therefore a failure to prove the charge.

(c) If the reasonableness of the compensation paid was an issue, the evidence was insufficient to warrant the submission of that question to a jury, because there was no showing as to the total of the services rendered by the defendants or as to the reasonable value of their services.

(d) The evidence discloses an arrangement entered into for the payment to the defendants of a part of the earnings of Consensus as compensation for services. The arrangement made had nothing to do with either the tax liability of Consensus or of the defendants. Subsequently, the amounts paid to the defendants were taken by Consensus as deductions in its income tax returns. There is no evidence that Ragen, Sr. had anything to do with those returns or knew their contents or knew of the deductions taken. There is an entire absence of evidence that anything that Ragen, Sr. did was done in bad faith with intent to defeat or evade a tax against Consensus or pursuant to a conspiracy entered into for that purpose. There is no showing that Ragen, Sr. had any knowledge of the existence of any conspiracy, if the evidence proved there was such a conspiracy. There can be no conviction of one as a conspirator in the absence of knowledge on his part of the conspiracy, even though he may have performed some act which furthered the object of the conspiracy.

II.

The Government should not be permitted to shift its position as to whether the case presents the question of there being a sufficiently definite standard of guilt for a

jury to convict. The Government, in the Circuit Court of Appeals, urged that the deductions must be treated either as dividends in their entirety or as commissions in their entirety. This removed the constitutional question from the case. It was not brought back into the case by the Circuit Court of Appeals mentioning it as one alternative reason for its conclusion that the judgments should be reversed.

III.

If, however the constitutional question is properly before the Court, we submit the due process clause of the Fifth Amendment and the provision of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation require that a definite, ascertainable standard for determining guilt be prescribed by statute or regulation. There is no such standard, where a conviction may rest upon the judgment of a jury as to the reasonableness of compensation paid for services rendered.

IV.

The Government failed to prove the charge made in the indictment that no services were rendered. The Government's theory of the case below was that no such services were rendered. Its evidence was to the contrary. In the absence of evidence as to the total of the services performed and the reasonable value thereof, there was no foundation for any other contention.

A portion of the charge of the Court was properly held to be erroneous by the Circuit Court of Appeals because it was inconsistent with the indictment and the theory upon which the case was tried, and because it left the jury at liberty to speculate and conjecture, without evi-

dence on the subject whether any portion of the items paid was dividends as distinguished from compensation for services rendered.

The sufficiency of the exception to the charge is challenged by the Government but that challenge is not meritorious under the authorities. The exception was sufficient. In any event, error in the charge in criminal cases may be noticed, although not properly raised by exception.

ARGUMENT.

I.

The Circuit Court of Appeals correctly held that the evidence was insufficient to support a verdict of guilty.

While the Government contends that the Circuit Court of Appeals did not expressly rule that the evidence was insufficient to support a guilty verdict, it admits that the "plain inference" of the opinion is that the Court reversed upon that ground (Gov. Br. 18). We do not believe any other conclusion can be drawn from the opinion.

The sufficiency of the evidence is the important question in the case, although the Government treats it rather summarily in its brief (pp. 17-22). The question as to whether there is a sufficiently definite standard of guilt to comply with the requirements of the Fifth and Sixth Amendments to the Constitution becomes important only after a determination that there was adequate evidence to authorize submission of the cause to a jury. The constitutional question was only one alternative question considered by the Circuit Court of Appeals in reversing (R. 502). The Government, in its brief and in its oral argument before the Circuit Court of Appeals, avoided a presentation of its views upon that question by conceding that the deductions taken in the Consensus tax returns should be treated either as dividends in their entirety or as commissions in their entirety. (See opinion of the Circuit Court of Appeals, (R. 502), and discussion on pp. 40-45 of this brief.)

We have set forth in our Statement (pp. 13-16) all of the evidence relied upon to connect Ragen, Sr. with the alleged tax evasion or the alleged conspiracy to effect it. That evidence, we submit is insufficient to support a guilty verdict against him and the trial Court therefore should have directed a verdict in his favor.

A. The evidence is insufficient to sustain a guilty verdict against Ragen, Sr. upon the first four counts of the indictment.

The first four counts of the indictment (R. 2, 7, 11, 14), allege that defendants wilfully and knowingly attempted to evade and defeat a large part of the taxes imposed upon Consensus for the years 1933, 1934, 1935 and 1936, and such attempt was made by preparing and filing and causing to be prepared, sworn to and filed, income tax returns for that corporation for those years, claiming deductions for "commissions" in certain specified amounts for each of the years.

It will be noted that the years covered in these counts are 1933, 1934, 1935 and 1936. Ragen, Sr. ceased to receive commission payments upon March 19, 1931 (R. 426). He never was an officer or director of Consensus. He had nothing to do with its books, neither prepared, signed nor filed any income tax return of Consensus (Exs. 1-9), nor aided, abetted or assisted in the preparation or filing thereof, nor knew the contents thereof, nor the deductions taken therein.

The employment contracts which Ragen, Sr. did sign were employment contracts for the years 1930 and 1931 and the assignment which he executed to his son was of the 1931 employment contract (R. 381). None of these could have any connection with an attempt to evade or defeat taxes of the Consensus for the years 1933 to 1936.

Under such circumstances, it is difficult to see upon what theory Ragen, Sr. could be held to have attempted to evade or defeat any of the taxes upon Consensus for those years, by means of preparing and filing, or causing to be prepared, sworn to or filed income tax returns for that corporation for any of those years, as charged in those counts. A verdict of not guilty as to him upon those counts should have been directed. The judgment against him must stand or fall upon the sufficiency of the evidence to prove the fifth or conspiracy count.

B. The evidence is insufficient to sustain the verdict against Ragen, Sr., upon the fifth count of the indictment.

The substance of the fifth count of the indictment is that the defendants conspired to evade and defeat the payment of a large part of the income taxes imposed upon the Consensus Publishing Company for the years 1929 to 1936 inclusive, that the individual defendants in order to deceive officers and employees of the Government and to prepare the way for the making of false and fraudulent returns and for failing to pay true and correct taxes on the net income of the corporation, would dominate and control the corporation, and in each of the calendar years from 1929 to 1936 inclusive, caused the corporation to enter into certain employment contracts by the terms of which the corporation engaged the services of certain of the defendants in an executive capacity and agreed to pay them large percentages of the net profits of the corporation as commissions, wages and salaries; that pursuant to the conspiracy percentages of profits were paid to the defendants as they accrued at the end of each and every week during the contracts in accordance with the contracts, that the defendants would cause entries to be made upon the books of the corporation by virtue of which it was made to appear that such sums were paid as commissions and

salaries for services rendered, and that said sums would be fraudulently and falsely claimed and deducted as proper deductions from the gross income of the corporation. The sums paid under the employment contracts are set forth, and it is alleged that the defendants would not in fact be nor were they employed in any capacity whatsoever by the corporation by virtue of the contracts, nor did they or any of them nor anyone else for them render any services to the corporation by virtue of the contracts, but that in fact they were owners of beneficial interests in the corporation for themselves and others, and the monies paid to them by virtue of the employment contracts were in fact distributions of profits and dividends from the earnings of the corporation and taxable to it as net income, and the employment contracts, books, records and accounts reflecting the employment and the payments made thereunder were mere shams to evade payment of income taxes due from the corporation. It further alleged the filing of income tax returns claiming the commission items as deductions from gross income and various overt acts which were alleged to have been done in pursuance of the conspiracy (R. 18-27).

We submit that a verdict of not guilty as to the fifth count should have been directed for Ragen, Sr. on the following grounds:

(1) Commissions or percentages of net profits of a corporation paid for services rendered are deductible in computing taxable income.

(2) It is charged in the fifth count that the defendants did not, in fact, render any services to Consensus, and consequently the deductions therefor were unlawful. The evidence shows services were rendered. There was, therefore, a failure to prove the offense alleged in the count.

(3) If the reasonableness of the compensation paid to defendants was an issue in the case, the evidence was

insufficient to warrant the submission of that question to a jury, because (a) there was no showing that the services shown to have been rendered were all of the services rendered by defendants, and (b) there was no evidence of the reasonable value of the services rendered.

(4) There was a failure to prove that Ragen, Sr. was an original party to any conspiracy to evade taxes upon Consensus, or that knowing of any such conspiracy, he afterwards became a party thereto. Knowledge of the conspiracy is essential to charge one as a conspirator notwithstanding he may have performed some act which furthered the object of the conspiracy.

(5) There is no evidence Ragen had any intention to defeat or evade income taxes against Consensus, wilfully and in bad faith and with evil intent.

We submit the evidence discloses a business arrangement entered into by Ragen, Sr. in 1929 for the payment to him of a part of the profits of Consensus as compensation for his services. The arrangement so made had nothing to do with either Consensus' tax liability or his own. Subsequently the amounts so paid to him and to others were taken by Consensus as deductions in its income tax returns. There is no evidence that he had anything to do with those returns, or knew their contents or of the taking of the deductions or of the intention to do so. There is an entire absence of evidence that anything that Ragen, Sr. did was done in bad faith, with intent to attempt to defeat or evade a tax against Consensus, or was done pursuant to a conspiracy of which he had knowledge entered into for that purpose.

(1) *Commissions or percentages of net profits of a corporation paid for services rendered are deductible in computing taxable income.*

It is well established that commissions or percentages of the net profits or earnings of a corporation may be

paid by it for services rendered and may properly be deducted in computing its net taxable income under the applicable Revenue Acts and the Regulations made thereunder. Section 23(a), Revenue Act of 1932, 26 U. S. C. A. Section 23(a), quoted at page 36 of petitioner's brief, and Sections 23(a) of the Revenue Acts of 1928, 1934 and 1936 which are identical; Treasury Regulations 74, Article 126, promulgated under the Revenue Act of 1928, quoted in the appendix to this brief, and Article 126 of Regulations 77, and Article 23 (a)-6 of Regulations 86 and 94, promulgated under the Revenue Acts of 1932, 1934 and 1936, respectively, all of which articles are substantially identical; *William S. Gray & Co. v. United States*, 35 F. (2d) 968, 974 (Court of Claims); *Austin v. United States*, 28 F. (2d) 677-678 (C. C. A. 5th).

In *William S. Gray & Co. v. United States*, it was held that contingent compensation of \$699,645 in addition to fixed salaries of \$160,000 paid during three years to certain executives and directors who were also stockholders owning 88% of the capital stock of the corporation, amounting to all of the corporation's earnings after a 7% dividend, was deductible by the corporation.

In the *Austin case*, sums paid for services under a contract providing for the payment of all of the corporation's net profits as compensation for services were held to be deductible. In one year this sum was approximately \$168,000.

There is controversy on the question whether the evidence shows that the individual defendants were stockholders of Consensus. We believe the evidence does not establish that Ragen, Sr. was a stockholder. The evidence on this subject is set forth on page 14 of this brief. His stock ownership does not appear of record, there is no showing that he paid anything for the stock, and the affirmative evidence establishes that it was the intention

that Cecelia Company should be the owner of all of Consensus' stock and that certainly was finally accomplished (R. 374, 387, 416). No dividend was declared by Consensus, and none was ever paid by it except to Cecelia Company (R. 327, 328, 360, 361, 412).

However, whether or not the defendants were stockholders is not of controlling importance. Persons who perform services for a corporation are entitled to receive compensation therefor, even though they are stockholders, and the corporation is entitled to deduct a reasonable allowance for compensation paid for such services, even though the recipients are stockholders. The evidence shows that the defendants rendered services to Consensus. The evidence fails to show that the services disclosed were all the services performed by them for the Company. There is thus no evidence as to the quantum of services rendered by the defendants. Moreover, there is no evidence as to the reasonable value of the services rendered by the defendants. Upon such a record it cannot be said that the sums deducted for commissions paid to the defendants were in excess of a reasonable allowance of compensation for services rendered by them. There is thus no showing that tax evasion in point of fact occurred or was attempted.

(2) The fifth count charges that no services were rendered by defendants to Consensus. The evidence shows that services were rendered by them. A verdict should have been directed, because the charge was not proved as alleged.

The substance of the fifth count of the indictment (R. 18-27), summarized above is that the individual defendants, having control of Consensus, conspired to cause it to pay commissions to them for their services in an executive capacity, intending that no services were to be performed by them, and that the amounts paid as commissions, though in fact distributions of earnings and profits, were to be

and were deducted in its income tax returns as commissions for services rendered, and that no services were performed by the defendants.

The Circuit Court of Appeals decided (R. 502) that the conspiracy count of the indictment directly alleged that none of the defendants rendered any services to Consensus. The Government urges (Govt. Brief pp. 31, 17, 18, 3) that the Court misread the fifth count. It contends that the fifth count does not allege that no services were performed by the defendants but only that no services were performed by virtue of the so-called employment contracts, and that it charged that the employment contracts, which had been dated back, were spurious.

This construction, presented by the Government for the first time in its brief in this Court, is a rather belated one. The Government did not so construe this count in its petition for certiorari. There, in Footnote 9 on page 15, it is said:

“Count 5 of the indictment, it is true, alleges that none of the defendants performed any services for Consensus (R. 23), while the proof showed that some of the defendants did perform services.”

It is evident from the opinion of the Circuit Court of Appeals (R. 502) that the Government did not argue for any such construction of that count before that Court.

Actually, the fifth count contains no allegation that the employment contracts were spurious because of their being antedated. The charge was that they were shams because services were not intended to be and were not rendered and the distributions, in fact, were dividends (R. 23). The draftsman of that count evidently regarded the employment contracts as executed on the dates they bear, because it is alleged (R. 22) that the persons charged in the in-

-dictment "in each of said calendar years 1929 to 1936" caused the corporation to enter into the so-called employment contracts. The count, in stating the overt acts committed (R. 25-27), alleges the signing of the employment contracts on the respective dates they bear and not on the dates, some years later, when they were actually executed. It also charges (R. 22) that the weekly payments to defendants were made in accordance with the employment contracts, and the amounts alleged to have been so paid in each year, including the years before the employment contracts were signed, are the amounts which were actually paid in each year as "commissions."

Further on in the same count (R. 23) it is alleged that "the defendants were not employed in an executive capacity or in any capacity whatsoever by virtue of the employment contracts, nor did they render services by virtue of them, but that they were owners and holders of beneficial interests for themselves and others in the corporation, and all of the moneys paid to them by virtue of the employment contracts were distributions of profits and dividends from earnings of the corporation."

It is evident that the indictment was intended by the pleader to charge that the weekly payments made to each of the defendants receiving commissions through the period covered by the indictment were received by them as "distributions of profits and dividends from the earnings of the corporation" (R. 23) and were not paid to them for services rendered to Consensus, and that they did not render services to Consensus in an executive or in any other capacity.

If the fifth count should be given the construction for which the Government now contends, its averments would be insufficient. There would be no averment denying that defendants had performed services for Consensus other-

wise than under the employment contracts. For any such services they would have been entitled to compensation which could properly be deducted. The count would contain no denial that the deductions taken in the return for commissions were not properly allowable to Consensus as compensation for services rendered otherwise than under the employment contracts.

The Circuit Court of Appeals rightly concluded that the fifth count charged that no services were rendered by any defendant to Consensus and that the evidence disproved that allegation with respect to all defendants. We have set out in this brief (pp. 6-9) the services rendered by the defendants disproving the charge that no services were rendered by them.

(3) There was no showing as to the total of all services rendered by the defendants to Consensus or the reasonable value of those services. Even if the question of the reasonableness of the compensation were an issue in the case, a verdict should have been directed, because the evidence was insufficient to warrant the submission of that question to a jury.

The Government, in its brief (p. 22) asserts that evasion of the entire amount charged is not required to be proved. We do not question the correctness of that statement as an abstract proposition of law. However, the Government is required to prove evasion of some part of the tax by competent evidence. The jury cannot indulge in speculation or conjecture unsupported by evidence.

It was incumbent upon the Government to introduce evidence as to the total of the services performed by defendants for Consensus and the reasonable value of those services, if it intended to raise the question that part of the payments made to the defendants were in excess of reason-

able compensation and thus not deductible in ascertaining the net income of Consensus.⁴

If it was intended to be urged that the payments constituted unreasonable compensation, evidence should have been introduced as to the time spent by defendants, the nature and extent of the services rendered by them, the value of the results accomplished, their aptitude for the work, and the amount of compensation which would be reasonable for the services shown to have been rendered. Those matters, as well as the circumstances existing at the time the arrangement was made for compensation, were necessary to enable the jury intelligently to pass upon the question of the reasonableness of the compensation paid. In 1929, when the agreement to pay commissions was made, the business was unprofitable, and the expected profits of Consensus were speculative. "The circumstances to be taken into consideration are those existing at the date the contract for services was made, not those existing at the time when the contract is questioned." (Treasury Regulations set forth in the Appendix.) The Circuit Court of Appeals on this subject said (R. 500):

"There was no proof and no effort by the Government to show that the services disclosed constituted the total of those performed and no effort to show the reasonable value of such services."

The deductions for commissions could have been improper only upon one of two hypotheses: either (a) the deductions were improper in their entirety because the defendants rendered no services, or (b) the deductions

⁴ In the Circuit Court of Appeals, the Government took the position that the payments to the defendants should be considered either as dividends or as commissions in their entirety; that there was no middle ground. See opinion of the Circuit Court of Appeals (R. 502) and argument under Point II of this brief upon this question.

were improper in part because in excess of reasonable compensation for services rendered. The Government chose to present its case upon the first alternative, but its evidence did not prove it. There was no attempt by the Government to introduce evidence to make out a case under the second alternative, and there was no evidence upon which the case could have been submitted to the jury upon that hypothesis. Any verdict upon that hypothesis could rest only upon speculation and conjecture.

(4) *Knowledge of the conspiracy is essential in order to charge one as a party thereto, notwithstanding he may have done some act in furtherance of the object of the conspiracy.*

In *United States v. Falcone*, 311 U. S. 205, 210, the Court held that the gist of the offense of conspiracy "is agreement among the conspirators to commit an offense, attended by an act of one or more of the conspirators to effect the object of the conspiracy," and that "those having no knowledge of the conspiracy are not conspirators," even though acts done by them may have furthered the object of the conspirators. We shall argue the application of this ruling to Ragen, Sr. under subheading (6) of this point.

(5) *In a prosecution for a wilful attempt to defeat and evade taxes it is not sufficient to show merely that a lesser tax was paid than was due. It is essential to prove that the acts complained of were wilfully done in bad faith and with evil intent to defeat and evade the tax.*

In a prosecution such as this, an essential element of the crime which must be established, is that the acts complained of were done wilfully, in bad faith and with evil intent; it is insufficient to establish merely that the acts were done intentionally without legal justification, and that less tax was paid than was due. (*United States v. Murdock*, 200 U. S. 389, 397.) Indeed the Government's Brief (p. 16) recognizes this to be the law. Under subheading (6) we

shall discuss the application of this rule of law to the evidence in the case pertaining to Ragen, Sr.

(6) *The evidence does not show that Ragen, Sr. had any knowledge of the alleged conspiracy and does not show that he did any act in bad faith or with evil intent in an attempt to evade or defeat payment of Consensus' income taxes.*

The authorities cited under subheading (1) above establish that there was nothing inherently wrong with an arrangement for the payment of commissions to defendants for services rendered to Consensus, and that to the extent such payments were reasonable, they were deductible in computing net taxable income under the applicable Revenue Acts.

No inference can be derived from the evidence concerning the agreement made in 1929 during the conference at which Annenberg, Molasky, Arnold W. Kruse and Ragen, Sr. were present (R 419), other than that a business deal was then agreed upon which was for the mutual benefit of all parties concerned. Nothing was said or done at that meeting indicating that the parties had any question of tax liability under consideration, or that any of them had any other motive or intention in mind than that of collecting for their own benefit the sums agreed to be paid to them. Consensus was not then in existence. In fact, there was nothing said at that meeting about the organization of a corporation. There was nothing said as to how income tax returns of the business should be made up or whether income tax deductions should or should not be taken for the payments to be made to Molasky, Kruse and Ragen, Sr. The evidence shows that the arrangement then made, afterwards confirmed by the written employment contracts, was carried out. It is not shown that Ragen, Sr., was ever consulted with regard to the preparation of any income tax return of Consensus or the deductibility by it of the commission items, or had

anything to do with the signing or filing of its tax returns, or knew what any of those returns contained. He was not an officer or director of Consensus. It is shown (Ex. 30, 31, 32) that Ragen, Sr., in his personal income tax returns, included the commissions received by him as compensation for services, paying normal taxes and surtaxes thereon, although, if the amounts had been considered by him in his returns as dividends, he would have had to pay surtaxes only thereon.

The Government contends that in 1934 the question of the deductibility of the commission payments under a Board of Tax Appeals decision was discussed (R. 393). This discussion took place between Kruse and Kamin. In 1931, Ragen, Sr. had ceased to be a recipient of commissions (R. 426). There is nothing to indicate that the question of the deductibility of the commissions was ever discussed with him or that he knew anything regarding that question. He was asked by Kamin, his employer's lawyer (R. 381), some time between 1934 and 1936 to sign the written employment contracts evidencing his employment for the years 1930 and 1931 by Consensus and the assignment of his contract of employment to his son. There was no reason why he should not do this, as the written contracts merely evidenced his understanding of what had already occurred, and they were in accordance with the agreement that he had made concerning receiving commissions. There is nothing to show that Ragen, Sr. knew that the execution of any of these papers had any connection with any plan, if there was one, to evade income taxes of Consensus or with any issue of tax liability of that company. There was nothing to indicate to him that any conspiracy existed, if one did exist, to attempt to evade or defeat any part of the tax liability of Consensus. Having no knowledge of the conspiracy, under the *Falcone* case, 311 U. S. 205, 210, Ragen, Sr. was not a conspirator, even though his acts in signing

employment contracts and the assignment of one of them to his son may be claimed to have furthered the object of the alleged conspiracy.

In *Dahly v. U. S.*, (C. C. A. 8) 50 F. (2d) 37, 43, the court said:

"Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendants did something other than participate in the offense which is the object of the conspiracy. There must, in addition, thereto, be proof of the unlawful agreement and participation therein, with knowledge of the agreement."

Davidson v. U. S., (C. C. A. 8), 61 F. (2d) 250, 253 and *Weniger v. U. S.*, (C. C. A. 9), 47 F. (2d) 692, 693, are to the same effect.

Here there is entire absence of evidence of the unlawful agreement, or of participation therein by Ragen, Sr. with knowledge of the unlawful agreement.

On Page 18 of its brief, the Government says that the opinion of the Circuit Court of Appeals "undertakes to cast a balance between the *conflicting inferences*," and on page 20 refers to "persuasive inferences" that might be drawn from certain evidence, and on page 21 argues that all conflicts should be resolved against respondents.

The *evidence* in the case was not conflicting. It was that of the Government alone. If "*conflicting inferences*" can be drawn from undisputed evidence so that every hypothesis except that of guilt is not excluded, the accused is entitled to a directed verdict.

In *Nicola v. United States*, 72 F. (2d) 780, 786 (C. C. A. 3), in a prosecution for tax evasion, the Court said:

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the

jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction."

In *Tragle v. United States* (C. C. A. 8), 28 F. (2d) 573, 575, it was said:

"Circumstances merely arousing suspicion of guilt are insufficient. It must be remembered that appellant introduced no witnesses. *The evidence was unconflicting and was that of the government alone. In such case, when the circumstances relied upon are as consistent with innocence as with guilt, they are robbed of all probative value.*" (Italics supplied.)²

In a footnote on page 21 of its brief, the Government cites *Crunk v. U. S.* (C. C. A. 7), 54 F. (2d) 618 to support the assertion that the accused cannot fairly ask a reviewing court to assume that prejudicial facts which had been proved and were unexplained could have been overcome on some hypothesis, had the accused testified. But in that case there was direct evidence that the accused had received large sums of money as income from his business which were not reported in his income tax return. That case has no application here. In the *Guzik* case, the Court threw upon the accused the burden of explaining away evidence of guilt. Here a record is being reviewed which contains no evidence of guilt. The Court is asked to infer guilt, because of failure to testify. No such inference logically can be drawn.

² To the same effect are *Kassin v. U. S.* (C. C. A. 5), 87 F. (2d) 183, 184; *Paddock v. U. S.* (C. C. A. 9), 79 F. (2d) 872, 876; *Toubin v. U. S.* (C. C. A. 10), 93 F. (2d) 861, 867; *Ridenour v. U. S.* (C. C. A. 3), 14 F. (2d) 888, 892; *Nussimvitz v. U. S.* (C. C. A. 2), 282 F. 575, 578; *Hendrick v. U. S.* (C. C. A. 6), 233 F. 5, 18; *Langer v. U. S.* (C. C. A. 8), 76 F. (2d) 817, 827; and *Davidson v. U. S.* (C. C. A. 8), 61 F. (2d) 250, 253.

The entire absence of bad faith and of intent to evade or defeat any tax upon Consensus by taking the deductions for commissions is shown by the circumstances that each of the income tax returns for Consensus for the years 1929 to 1936 claimed deductions for commissions, and a schedule was attached to each return in which the item of commissions as a deduction appeared. The following schedule for the year 1934 (Ex. 6) is typical of the other years:

| | |
|-----------------------|------------------|
| Gross Income | \$129,665.78 |
| Deductions | |
| Rent | \$ 650.00 |
| Interest | 347.82 |
| Taxes | 293.00 |
| Depreciation | 1,214.00 |
| Salaries and Wages | 12,708.56 |
| <i>Commissions</i> | <i>60,172.23</i> |
| Delivery | 4,420.00 |
| Elec. & Gas | 139.45 |
| Exchange | 155.76 |
| Express & Postage | 3,891.59 |
| General Expense | 674.06 |
| Insurance | 143.86 |
| Mechanical Supplies | 162.76 |
| Office Supplies | 1,785.00 |
| Paper & Cards used | 2,069.17 |
| Printing | 5,200.00 |
| Service | 5,100.00 |
| Stationery & Printing | 53.30 |
| Tele. & Tele. | 413.17 |
| Traveling Expense | 655.00 |
| Checks, N. S. F. | 151.34 |
| Total deductions | 100,400.07 |
| Net income | \$ 29,265.71 |

The returns of Consensus for the years 1931 and 1932 were audited by officers of the Internal Revenue Service. Additional taxes of \$24.00 for one year and \$96.10 for another year were assessed and paid. The deduction for commissions does not appear to have been questioned (R. 316).

In determining the issue of whether these deductions were taken in bad faith, it is to be remembered that until the Revenue Act of 1936 compensation for services received by individuals was subject to normal taxes and surtaxes, whereas dividends were subject only to surtaxes until that year. Because of this, the Government received more in normal taxes from the defendants than would have been payable if the amounts had been treated as dividends in the defendants' income tax returns. If Consensus had paid taxes on its income without deductions for commissions, the individuals would have received lesser sums for commissions. Therefore, less in individual surtaxes would have been paid by them.

It is not to be overlooked that the alleged conspiracy is said to have been hatched in 1929. Tax rates were much less then than they were in later years. Under conditions existing in 1929, and under the low tax rates then prevailing, the total tax savings to be gained as a result of the alleged conspiracy would have been trifling. The amount of the prospective profits of Consensus and of the corporate taxes thereon were speculative at that time. The business theretofore had been unprofitable. These circumstances should dispel any inference of the existence of a motive on the part of the defendants to evade income taxes. There is no evidence of an agreement or an arrangement made at that or at any other time, of which Ragen, Sr. had knowledge regarding the method to be used in reporting the payments made to the defendants on the income tax returns of Consensus.

There is evidence that reports made by the bookkeepers accompanied the weekly checks to Ragen, Sr., in which the distributions were designated as dividends (R. 334). The Government attaches significance to this, as indicating that the recipient knew that the items were dividends and not commissions (Gov. Br. 9, 20). But so far as Ragen, Sr. is concerned, if such knowledge is to be imputed to him, did he not also have the right to assume that the items were shown also as dividends on the books of the company and that the tax returns of the company would be made by those charged with that duty on the same basis?

In *Austin v. United States*, 28 F. (2d) 677, one of the questions which was considered was whether in a case where the entire net profits of the business had been paid out in salaries and taken as deductions in computing taxes there had been any intention to evade payment of taxes. The language used by the Court is so apt in its application to the present case that we make the following quotation from it (p. 678):

"We agree with the District Judge that the evidence does not disclose any intention on the part of the stockholders to take advantage of their corporation, or to evade payment of income and excess profit taxes. Austin and Snook owned all the stock of the coal company, and it made little difference to them whether they received the profits as salaries or as dividends. They paid income taxes on their salaries, and there would have been little if any, difference if the corporation had itself paid the taxes and distributed the profits to them as dividends. There was no effort at concealment by the corporation, which included in its income returns the statement that it had paid out its entire net profits as salaries. Nor was there any effort at evasion by the stockholders, who included the salaries they had received. With full knowledge, the government ac-

cepted the income taxes upon the salaries. Though the fact that these payments were collected and are yet retained affords no defense to this suit, it does remove from the case any element of bad faith."

The circumstances which the Court in the *Austin* case said removed any element of bad faith from the case are present here. Consequently, we submit that the evidence does not show any bad faith, or attempt to evade or defeat taxes, and therefore, following the doctrine of the *Murdock* case, 290 U. S. 389, 397, a verdict for the defendants should have been directed.

II.

The question as to whether there is a sufficiently definite standard of guilt for the jury to convict, if defendants rendered any services to Consensus, is raised by the Government for the first time in this court. In the courts below the Government contended that question was irrelevant. The Government should not be permitted to shift its position.

The Government's theory in the lower courts was that all distributions made by Consensus were distributions of earnings or dividends to stockholders, and that no part was compensation for services rendered. The Government's contention was so understood by the Circuit Court of Appeals (See R. 501). Under this theory, no issue could arise as to the definiteness of the standard of guilt to meet constitutional requirements.

Faced with the holdings of the Court below that the payments were not all dividends and that it had failed to prove the charge in the indictment that defendants had not rendered any services to Consensus, the Government now changes its theory.

It urges (Government Brief p. 22) that the case involves the question as to whether convictions may be obtained, if the payments represented in part compensation paid for services which were deductible, if the remaining portion thereof was not. This contention is based upon the view that the Government is not required to prove an evasion of all the tax charged, but only of a substantial part. Yet no attempt was made by the Government upon the trial to show all of the services performed for Consensus by defendants or the value of their services.

In the Circuit Court of Appeals the Government in its brief urged:

"First the defendants contend that the alleged commissions representing the distributions of seventy per cent of the company's net profits were deductible expense and they cite the section of the revenue acts which allows deductions for necessary and proper expenses. It is submitted that (1) the question here is not one of the deductibility of commissions paid out by a corporation in the operation of its business but whether these payments of net earnings were 'commissions' " (p. 75).

"On the basis of the foregoing, it is respectfully submitted that there is no issue involved in this case regarding the question of whether commissions may be deducted or whether the payments were reasonable. We cannot repeat too often that there are no questions concerning commissions, because these payments were dividends and were known to be such by the defendants. *Likewise it is wholly irrelevant to discuss the question of whether it would be a violation of the Fifth and Sixth Amendments if individuals were convicted of a crime of deducting unreasonable commissions*" (pp. 82, 83). (Italics supplied.)

The same theory was also advanced by the Government in the trial court. (See argument on motion for a directed verdict. R. 459.)

The argument of the Government in the Circuit Court of Appeals is thus stated in the opinion below (R. 502):

"The Government in its brief and in oral argument before this Court asserts that the deductions in question must be treated either as dividends in their entirety, and if so as unlawful deductions, or as commissions in their entirety, and therefore properly deducted. In other words, in accordance with this argument there can be no middle ground."

After the opinion of the Circuit Court of Appeals was rendered, the Government, on page 13 of its petition for rehearing, adhered to its position on this question, saying:

"Again, it must be emphasized that the indictment in the case at bar does not charge that the defendants willfully attempted to evade and defeat taxes by taking deductions of *unreasonable amounts* as commissions, that is, payment for services; rather it charges that the defendants willfully attempted to evade and defeat taxes by claiming as deductions for commissions, amounts which were in fact distributed as dividends and were not intended as compensation for services." (Italics supplied.)

If it was intended by the Government to raise the question as to whether there could be a conviction if only a portion of the commissions paid were not deductible, on the theory that such commissions were in excess of reasonable compensation for services rendered, it would have been essential for the Government to prove all the services rendered by the defendants for Consensus and the reasonable value thereof. But, as stated by the Circuit Court of Ap-

peals: "There was no proof and no effort by the Government to show that the services disclosed constituted the total of those performed and no effort to show the reasonable value of such services" (R. 500).

Indeed, the statement on page 82 of the Government's brief in the Circuit Court of Appeals, "that there is no issue involved in this case regarding" * * * "whether the payments were reasonable", demonstrates the correctness of the conclusion of the Circuit Court of Appeals that the deductions in question under the Government's theory must be treated as dividends in their entirety or as commissions in their entirety. We cannot believe that the Government intends to argue that the jury had the right to speculate, without any evidence on the subject, as to what portions of the sums paid to the defendants were paid as compensation for services and what portions were paid to them as distributions of profits in consequence of their alleged stock holdings.

The question arising under the Fifth and Sixth Amendments to the Constitution, stated in the above quoted excerpt from the Government's brief below, as being wholly irrelevant, is the question now urged by it as the principal question in the case. Yet it refused to discuss that question before the Circuit Court of Appeals and ignored *United States v. Cohen Grocery Co.*, 255 U. S. 81, and cases of similar import, which had been cited and referred to by respondents, thus depriving the Court below of the assistance of the Government's views upon that question.

The question was raised in the briefs filed by respondents in the Court below, but was removed from the case by the position taken by the Government in its brief.

It is true that the Court below held that there was not a sufficiently definite standard of guilt to meet constitutional requirements as one of the alternative grounds for its de-

cision that the case should not have been submitted to the jury. But when it held, in accordance with the Government's contention, that there could be no middle ground, because the indictment charged that none of the defendants had rendered services (R. 502) and that no evidence as to the total of the services performed or as to the reasonable value thereof had been introduced (R. 500) there was no necessity to consider the constitutional question. The decision on that question was not necessary to support the Court's conclusion. The Court had accepted one of the alternatives presented by the Government. Its acceptance thereof removed the essential premise upon which the constitutional argument had been based,—that if reasonableness of the compensation paid for the services performed was the criterion of guilt, a sufficiently definite standard to meet constitutional requirements was not afforded.

In *Helvering v. Wood*, 309 U. S. 344, 349, the question arose as to whether there could be raised in this Court on *certiorari*, a question of law not raised in the Circuit Court of Appeals, in a case where reliance upon a specified section of the Revenue Act (which the court held not applicable) was made and reliance upon any other ground had been waived. The Court held that the Commissioner of Internal Revenue should not be allowed "to add here for the first time another string to his bow"; that "to open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation."

The Government now raises the constitutional question in order to sustain a conviction, if any "substantial portion of the payments involved constituted distributions of corporate profits rather than true commissions" (Br. p. 22), although it is clear from its briefs below and from what is

said in the opinion below concerning its oral argument that it there disclaimed any middle ground and elected to stand or fall upon the theory that the payments to defendants were either dividends in their entirety or commissions in their entirety.

To permit such a shift to a ground which the defendants had every reason to think was abandoned in the earlier stages of the litigation, is condemned by the opinion in the *Wood* case.

Particularly should the rule be enforced here, where the contention made, i. e., that there may be a conviction if any part of the tax due has been wilfully evaded, is not founded upon evidence in the record showing the total of the services performed by defendants or the reasonable value of the services performed. Indeed, if the conviction is to be affirmed, it must be upon the theory that the jury, without evidence on the subject, had the right to conjecture that some part of the payments made to the defendants represented a distribution of earnings as dividends and that consequently there was tax evasion.

III.

To permit a conviction to rest upon the determination by a jury of the reasonableness of the compensation paid for services rendered, without a definite standard for determination of that question, prescribed by statute or regulation, would be contrary to the due process clause of the fifth amendment and the provision of the sixth amendment that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation.

Although the prosecution was under Section 145 (b) of the Revenue Act for wilfully attempting to evade income

taxes, and Section 88, Title 18 U. S. C. A., for conspiracy to evade income taxes, the question of whether any tax was attempted to be evaded is dependent upon Section 23 (a) of the Revenue Act, providing that in computing net income, there shall be allowed as deductions "all the ordinary and necessary expenses paid or incurred during the taxable year, including a reasonable allowance for salaries or compensation for personal services actually rendered."

Under the due process clause of the Fifth Amendment and the provision of the Sixth Amendment that the accused shall enjoy the right to be informed of the nature of the accusation against him, all crimes are required to be specifically defined, so that one may know in advance whether an act is within or without the interdiction of the law. The question of guilt or innocence cannot be left to the whims or fancies of triers of the facts, without definite ascertainable standards to guide them. Leaving to the triers of fact the question of guilt or innocence, depending upon their determination of the reasonableness or unreasonableness of the amount of compensation paid for services rendered is violative of the foregoing Amendments of the Constitution. *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 89; *Connally v. General Construction Co.*, 269 U. S. 385, 391; *Collins v. Kentucky*, 234 U. S. 634, 638; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221; *American Machine Co. v. Kentucky*, 236 U. S. 660, 661; *U. S. v. Pennsylvania Railroad Co.*, 242 U. S. 208, 237; *Smith v. Cahoon*, 283 U. S. 553, 564; *Small Co. v. American Refining Co.*, 267 U. S. 233, 238; *Champlain Refining Co. v. Commission*, 286 U. S. 210, 242; *Herndon v. Lowry*, 301 U. S. 242, 262-264; *Lanzetta v. New Jersey*, 306 U. S. 451, 453.

The Treasury Regulation ^a on the subject of deductibility of items paid for services is no more adequate than the statute in fixing a standard.

^a This Regulation is set forth in the appendix to this brief.

In *United States v. Cohen Grocery Co.*, 255 U. S. 81, the Court considered the constitutionality of the Lever Act, the material provisions of which are contained in the below quoted excerpt from the opinion. The Court held the Act unconstitutional, because it afforded no ascertainable standard of guilt, in that the words, "unjust" and "unreasonable" were inadequate to inform persons accused of the nature and cause of the accusations against them. The Court said, at page 89:

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, 'that it is hereby made unlawful for any person *wilfully* * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." (Italics supplied.)

The Government seeks to distinguish the *Cohen Grocery Co.* case on the ground that the statute here requires that there be a wilful attempt at tax evasion. But in the *Cohen* case also the statute required the prohibited action to be wilful and the statute was so interpreted by the Court. (See statute as quoted at 255 U. S. 89.)

The standard of guilt furnished by the Revenue Act, i. e. "a reasonable allowance for salaries or other compensation for personal services actually rendered" is no more definite or certain than that fixed by the statute held invalid in the *Cohen* case.

As illustrative of the conflicting results likely to be obtained if the question of the propriety of the taking of a deduction for compensation payable upon a percentage basis may be left to the judgment of the triers of the facts, dependent upon their view of the reasonableness or unreasonableness of the amount of the compensation, we point to the jury verdict in this case, and ask that it be compared with the results in civil cases where like questions were under consideration.⁷

⁷ In *Wm. S. Gray & Co. v. United States*, 35 F. (2d) 968, (Court of Claims), commissions in addition to fixed salaries of a substantial sum were paid by a corporation to certain executives and directors, who also owned 88% of the stock, amounting to all of the corporation's earnings after a 7% dividend on its stock. The corporation's income after taxes and expenses (exclusive of compensation to executives and directors) and the amounts paid as commissions and fixed salaries were:

| | Income | Fixed Salaries | Com- missions |
|------------|--------------|----------------|------------------|
| 1916 | \$507,786.00 | \$25,800.00 | \$430,000.00 |
| 1917 | 488,941.00 | 53,750.00 | 196,145.00 |
| 1918 | 296,173.00 | 80,000.00 | 73,500.00 |

The sums paid for compensation for services were held properly deductible.

In *Austin v. U. S.*, 28 F. (2d) 677 (C. C. A. 5) sums paid to the three officers of a company under a contract to pay each officer one-third of its net profits were held properly deductible. In one year the sum paid to the officers was approximately \$168,000.00.

The *Gorin* case, 312 U. S. 19, principally relied upon by the Government, refers to the *Cohen Grocery Co.* case with approval. In the *Gorin* case the statute involved prohibited obtaining and delivering documents "connected with the national defense" with "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign power." The court held that the sanctions of the statute applied only when the specific scienter required by the statute was established and that "the use of the words 'national defense' has given them as here employed, a well understood connotation." The Court defined the term "national defense," as meaning "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." It held that the words "national defense," as used in the Act, carried the meaning so defined, and that therefore the language employed "appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process."

In the case of Section 23(a) of the Revenue Act, as stated by the Court in *William S. Gray & Co. v. United States*, 35 F. (2d) 968, 973, "there is no fixed and unalterable standard or yardstick by which the question of the reasonableness of the compensation in any particular case can be measured." The determination of the standard depends upon the judgment of the triers of the facts.

The two cases (the *Gorin* and *Cohen Grocery Co.* cases) are but two of the many cases decided by this court determining on which side of the line falls a statute, the constitutionality of which is challenged on the ground that it does not provide a sufficiently definite standard of guilt. The *Gorin* case refers both to criminal statutes which were held to be too vague and thus to fall on one side of the line, and to other criminal statutes held to define a crime ade-

quately and thus to fall on the other side of the line. We submit the statute in this case, if construed as the Government seeks to have it construed, is within the former category, and that it is closer to the statute held unconstitutional in the *Cohen Grocery Co.* case than the statute involved in any case cited by the Government.

The factors involved in the process of differentiating statutes which do not furnish a sufficiently definite standard to meet constitutional requirements from those which do have been explained by the court in *Connally v. General Construction Co.*, 269 U. S. 385, 391. The court there considered the pre-constitutionality of a statute requiring a contractor to pay his employees "not less than the current rate of *per diem* wages in the locality where the work is performed." Denying that the statute contained an ascertainable standard of guilt, the court said (p. 391):

"The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 501, 69 L. Ed. 402, 407, 45 Sup. Ct. Rep. 141; *Onochovarria v. Idaho*, 246 U. S. 342, 348, 62 L. ed. 763, 767, 38 Sup. Ct. Rep. 323, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash v. United States*, 229 U. S. 373, 376, 55 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780, *International Harvester Co. v. Kentucky*, *supra*, p. 223, (58 L. ed.

1288, 34 Sup. Ct. Rep. 853), or, as broadly stated by Mr. Chief Justice White in *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 92, 65 L. ed. 516, 522, 14 A. L. R. 1045, 41 Sup. Ct. Rep. 298, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' See also *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 108, 53 L. ed. 417, 429, 25 Sup. Ct. Rep. 220. Illustrative cases on the other hand are *International Harvester Co. v. Kentucky*; *Collins v. Kentucky*; and *United States v. L. Cohen Grocery Co.*—*supra*, and cases there cited."

This opinion, it should be observed, treats *Omahechevaria v. Idaho*, 246 U. S. 343, 348, and *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 501, relied on by the Government to support the proposition that a statute cannot be attacked for vagueness where intent is required, as holding a statute is not vague where the words used have "a technical or other special meaning, well enough known to enable those within their reach to correctly apply them." No such element is present in this case. No well settled common law meaning, as in the homicide or restraint of trade cases, is present here. Nor is there, it is submitted, a standard of any sort contained in the text of the statute or the subject with which it deals.

On page 28 of its brief, the Government contends that Section 145 (b) prescribes its own standard and defines the crime charged, and complains that the court below disregarded that standard and seized upon the civil provisions of Section 23 (a), permitting deduction of reasonable business expenses, and, in effect, viewed the prosecution as based upon the latter section.

Under Section 145 (b) there must be an attempt at tax evasion. The question of tax evasion must be determined from a consideration of the applicable provisions of the Revenue Act, which in this case is Section 23 (a).

On page 30 of the Government's brief it is stated: "That men may differ on matters of judgment should afford no protection to those who wilfully make false returns." But here the question as to whether the return is false or not depends upon a matter of judgment. Here, if the statute is to be construed as the Government contends it should be, whether there is tax evasion or not depends upon the judgment of the triers of the fact as to the reasonableness of the compensation paid without any sufficiently definite standard laid down by the statute or regulations for determining that question.

The question here is not whether the Government is required to prove an evasion of all the tax charged, but whether it must prove an actual evasion of some part of the tax, the determination of which can be made by reference to a standard sufficiently definite to meet constitutional requirements.

The sufficiency of the statutes here involved to define an adequate standard of guilt was not raised or discussed in *Tinkoff v. United States*, 86 F. (2d) 868; *United States v. Kelley*, 105 F. (2d) 912; *United States v. Zimmerman*, 108 F. (2d) 370, or *Wagner v. United States*, 118 F. (2d) 801. Those cases involved the deduction of bad debts which were fictitious. The *Kelley* and *Wagner* cases also involved deductions for depreciation based on fabricated costs.

We submit that the trial court erred in instructing the jury in the manner set forth on pages 13 and 14 of the Government's brief⁸, because it thus left to the jury the

⁸ In addition to the portions of the charge to the jury set forth in the excerpts in the Government's Brief, the following portion of the charge is material:

"It is your duty to consider all the evidence in the case, including the circumstances, and from those, and considering nothing outside of the evidence presented to you, you must answer eventually the question of whether these sums distributed, or a substantial part thereof, actually represented profits, distribution of profits, rather than the payment of compensation" (R. 471).

question of guilt, depending upon the jury's finding as to the reasonableness of the compensation paid, without any sufficiently ascertainable standard for determining that question. This question was also raised by and argued on the motion for a directed verdict and on objections during the trial (R. 232; 432).

IV.

The Government failed to prove the charge made in the indictment. Error in the charge to the jury. The sufficiency of the exception to the charge.

The Government contends that the fifth count does not allege that no services had been performed, that it merely alleges that such services had not been performed by virtue of the so-called employment contracts (Gov. Br. 31).

We have already answered this argument (pp. 27-30 of this brief). We have also there answered the argument that the Government, in the courts below, did not contend that the deductions must be either wholly dividends or wholly commissions, as held by the Circuit Court of Appeals (R. 502). Indeed, in the absence of evidence as to the total of the services performed and the reasonable value thereof, there was no foundation upon which to base any other contention. The Government failed to prove the charge contained in the indictment on this subject.

The portion of the charge of the Court excepted to was properly held to be erroneous by the Circuit Court of Appeals because it was inconsistent with the indictment and the theory upon which the case was tried, and also because it left the jury at liberty to speculate and conjecture, without any basis in the evidence, as to what portion of the items paid was compensation for services and what portion was dividends.

The question involved is not one as to whether the Government is required to prove the entire amount of the tax charged to have been evaded. It is whether the Government is required to prove the charge alleged in the indictment, and to prove by competent evidence that there was a tax evaded or attempted to be evaded. The misleading and erroneous character of the portion of the charge excepted to is not obviated by any such hypotheses as are stated on pages 34 and 35 of the Government's brief. The criticized portion of the charge could only have been understood by the jury as authorizing them to determine whether any substantial portion of the amounts paid was a distribution of profits rather than the payment of compensation, thus leaving them at liberty to determine whether the amounts paid were excessive for the services performed, and if they so determined (although they could so determine only upon conjecture and not upon any evidence in the case), to return a guilty verdict.

The Government challenges the sufficiency of the exception taken to the criticized portion of the charge (Gov. Br. 34). The argument on the necessity of a definite standard of guilt was urged at length during the trial and on the motion for a directed verdict (R. 432, 458). The trial court was not in any doubt as to the question intended to be raised by the exception to the charge. The exception was sufficient.

However, "in criminal cases courts are not as inclined to be exacting with reference to the specific character of the objections made, as in civil cases." *Crawford v. United States*, 212 U. S. 183, 194. Indeed, reviewing courts in criminal cases may notice error occurring in the trial of a criminal case, although the question was not properly raised at the time by objection or exception. *Crawford v. United States*, 212 U. S. 183, 194; *Wiborg v. United States*, 163 U. S. 632, 658; *Weems v. United States*, 217

U. S. 349, 362. The Circuit Court of Appeals could have considered the questioned instruction even if no objection, exception or assignment of error had been taken thereto. *Lamento v. United States*, (C. C. A. 8) 4 F. (2d) 901, 904; *Meadows v. United States*, (Ct. App. D. C.) 82 F. (2d) 881, 884.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals was correct and should be affirmed.

Respectfully submitted,

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MATTHIAS CONCANNON,
 SIDNEY R. ZATZ,
Of Counsel.

APPENDIX.

Article 126, Regulations 74, issued under the Revenue Act of 1928:

ART. 126. *Compensation for Personal Services.*—

Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows:

(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. (a) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services, and the excessive payments correspond or bear a close relationship to the stockholdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock. (b) An ostensible salary may be in part payment for property. This may occur, for example, where a partnership sells out to a corporation, the former partners agreeing to continue in the service of the corporation. In such a case it may be found that the salaries of the former

partners are not merely for services, but in part constitute payment for the transfer of their business.

(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. Generally speaking, if contingent compensation is paid pursuant to a free bargain between the employer and the individual made before the services are rendered, not influenced by any consideration on the part of the employer other than that of securing on fair and advantageous terms the services of the individual, it should be allowed as a deduction even though in the actual working out of the contract it may prove to be greater than the amount which would ordinarily be paid.

(3) In any event the allowance for the compensation paid may not exceed what is reasonable in all the circumstances. It is in general just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises in like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned.

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

Article 126 is identical with Article 126 of Regulations 74.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

Article 23(a)-6 is identical with Article 126 of Treasury Regulations 77 above quoted, except that in sub-

section 3 the words "under all the circumstances" are used instead of the words "in all the circumstances" and the words "under like circumstances" are used instead of the words "in like circumstances."

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

Article 23(a)-6 is identical with Article 23(a)-6 of Treasury Regulations 86.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. ~~975-976~~ 55,56

THE UNITED STATES OF AMERICA,
Petitioner,
vs.

ARNOLD W. KRUSE, AND LESTER A. KRUSE,
Respondents.

**ANSWER TO PETITION FOR WRITS OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.**

GEORGE K. BOWDEN,
*Attorney for Respondents, Arnold
W. Kruse and Lester A. Kruse.*

WARREN CANADAY,
JOSEPH A. STRUETT,
Of Counsel.

INDEX.

| | PAGE |
|---|------|
| Preliminary Statement..... | 1 |
| Introduction | 2 |
| Questions Presented | 3 |
| The Indictment | 4 |
| The Evidence | 6 |
| Law Applicable..... | 9 |
| The Erroneous Instruction of the Court..... | 12 |
| The Petition for Certiorari Is Without Merit..... | 14 |
| Conclusion | 19 |

CITATIONS.

Cases:

| | |
|--|----|
| Austin v. United States, 28 Fed. (2) 676..... | 11 |
| Collins v. Kentucky, 234 U. S. 634..... | 15 |
| Gleckman v. United States, 80 Fed. (2d) 394..... | 13 |
| William S. Gray & Co. v. United States, 35 Fed. (2d) 968..... | 11 |
| International Harvester Co. v. Kentucky, 234 U. S. 216..... | 16 |
| United States v. Cohen, 255 U. S. 81..... | 16 |
| United States v. Kelley, 105 Fed. (2d) 912..... | 17 |
| United States v. Molasky, 118 Fed. (2d) 128..... | 2 |
| Zimmerman, in re, 108 F. (2d) 370..... | 17 |

Statutes:

| | |
|-----------------------------|----|
| Revenue Act, Sec. 23 A..... | 15 |
|-----------------------------|----|

Treasury Regulations:

| | |
|---------------------------------|----|
| Regulation 103, Income Tax..... | 11 |
|---------------------------------|----|

IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 975-976.

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

ARNOLD W. KRUSE, AND LESTER A. KRUSE,

Respondents.

**ANSWER TO PETITION FOR WRITS OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.**

Preliminary Statement.

Petitioner seeks to review this case on the representation that the Circuit Court of Appeals of the Seventh Circuit reversed this case on the ground that a criminal prosecution cannot be based on an indictment charging an income tax violation because the taxpayer claimed an unreasonable deduction from income, or proof only to that effect. Petitioner states this decision is of great public interest and in conflict with the decision of other courts. Such issue was never present in this case either under the indictment or the evidence. The court below made no such decision as petitioner claims. Petitioner seeks to have this court grant certiorari to pass on a principle of law not even involved herein.

Introduction.

The defendants, William Molasky, Arnold W. Kruse, James M. Ragen, Sr., James M. Ragen, Jr., and Lester Kruse were convicted of an attempt and conspiracy to evade the income taxes of the Consensus Publishing Company, an Illinois corporation (hereinafter referred to as Consensus). (R. 238-246.) These judgments were reversed and the cause remanded by the U. S. Circuit Court of Appeals for the Seventh Circuit (*U. S. v. Molasky*, 118 Fed. (2d) 128). Petitioner seeks certiorari to review the action of the Circuit Court of Appeals only as to the respondents, Arnold W. Kruse, Lester A. Kruse and James M. Ragen, Sr.¹

All defendants were employees and business associates of one M. L. Annenberg, who through a personal holding company known as the Cecelia Company dominated and controlled various corporations, including Consensus. Defendants were officers, directors, employees and in full charge of the operation of Consensus from 1929 to the time of the trial. (R. 500.) As such they were paid a certain percentage of the net profits for services rendered and to be rendered which were charged on the books as *commissions* and deducted as an expense in each and every income tax return filed by the company. *These commissions so paid were the only sums paid defendants for their services.*

Continuously from 1929 to the time of trial every item of income and every item of expense, including the commissions paid defendants, were truly and correctly reflected on the books of Consensus. These figures were in turn

¹ William Molasky and James M. Ragen, Sr. filed certain pleas in bar which were overruled. The Circuit Court of Appeals held this was error. Petitioner concedes the correctness of this ruling. (Petition 4.)

truly reflected and fully disclosed in each and every income tax return filed by the company. The income returns and the books of Consensus were audited by government agents from time to time, they were given any records or information desired and no objection was made by the government as to the payments made to the defendants for services as aforesaid or their deductions as a business expense in the income tax returns of the company. (R. 317, 318, 338, 361, 398, 425.)

In 1939 defendants were indicted in this case for an alleged scheme and conspiracy to defeat and evade the income taxes of Consensus for the years 1929 to 1936, the sole basis of which indictment was that the deduction of these commissions in their entirety as an expense for all the years in question was improper. The theory of the indictment was that defendants' employment was fictitious; that they were not in fact officers and employees of Consensus; that they rendered no services to the company, that the sums so paid as commissions were in fact *dividends* in that certain of the defendants, who received these commissions, were stockholders of the company; and therefore these sums were improperly deducted in their entirety as a business expense in the company's income tax returns.

Questions Presented.

The record presents two outstanding questions:

(1) Did the trial court err in refusing defendants' motions for directed verdicts because of the insufficiency of petitioner's evidence?

(2) Did the trial court err in its instructions to the jury?

These were the main questions presented to the Circuit Court of Appeals, analyzed and considered at length in their opinion and disposed of adversely to petitioner. Petitioner makes no attempt to answer the conclusions of the

Circuit Court of Appeals as to these issues. Petitioner here does not contend that the ultimate decision of the Circuit Court of Appeals on these questions was erroneous. Even assuming petitioner did, this Court under Rule 38 will not ordinarily grant certiorari to review such issues.

Petitioner contends that "the principal question presented is whether there is a sufficiently definite standard of guilt for the jury to convict if any services at all were rendered." (Petition 2) and refers to these principal issues in a footnote (Petition 2, footnote 1). Petitioner misstates the purport and effect of the indictment, the evidence, and the issues presented as a basis for its unfounded conclusion that the decision of the Circuit Court of Appeals in reversing these judgments is in conflict with the decisions of this Court and constitutes "a significant threat to the enforcement of the Revenue Laws" (Petition 11). Little justification for this statement can be gathered from the petition.

We believe this petition can best be answered by a short analysis of the charges of the indictment; certain uncontradicted portions of petitioner's own evidence; the law applicable and the erroneous instruction of the Court. We shall then point out that under the record in this case the petition for certiorari is without merit.

The Indictment.

The indictment (R. 2-27) consists of five counts, the first four counts charging an attempt to evade taxes for the respective years 1933 to 1936. These counts allege that Consensus had a gross income for the particular year of a certain amount, was entitled to certain specific deductions under the Revenue Act (omitting all sums paid defendants as commissions for services rendered), had a taxable income upon which a certain tax was due; that to defeat and evade income taxes of a certain specified amount defend-

ants filed an income tax return for the particular year showing a certain gross income, claiming certain deductions (which included the commissions paid), leaving a taxable income of a lesser amount upon which the proper taxes were paid. All items of gross income and deductions claimed by the government to be proper are identical with those set forth on the books of the company and in its income tax returns. Mathematical computation discloses that the alleged taxes sought to be evaded are arrived at by the complete elimination of the deductions for these commissions and the allowing to the defendants nothing for their services. *None of these counts contains any allegation charging that the deductions for these commissions were improper or why they were improper.*

The conspiracy or fifth count covers all the years in question (1929 to 1936) and is in effect similar to the substantive counts, namely, the taxes alleged to have been evaded arise out of the complete elimination of any deduction for these commissions paid the defendants. This count alleges that the deductions for these commissions were improper, in that defendants were not employees of the company and rendered no services to the company but were owners of a beneficial interest therein (stockholders) and the sums paid defendants as commissions were in fact dividends.²

The only charge in this indictment as to any evasion of

² "as the said defendants and each of them then and there well knew, the said defendants (referring to Molasky, Ragen, his son, Kruse, and his son) would not in fact be, nor were they, employed in an executive capacity or in any capacity whatsoever by the said corporation * * * during the said calendar years 1929 to 1936, both dates, inclusive, nor would they, nor did they, nor any of them, nor any one else for them, render any services to the said corporation * * * but that in fact, they, the said defendants, would be, and were, owners and holders of beneficial interests for themselves and others in the said corporation and all of the moneys to be paid and which were paid to them, and ~~each of them~~ * * * would be and were, in truth and in fact, distributions of profits and dividends from earnings of the said corporation." (R. 23.)

taxes or conspiracy to evade, was the deduction as a business expense of the commissions so paid these defendants. The only allegation as to the impropriety of these payments appears in the conspiracy count. No claim is advanced anywhere by petitioner that these payments were excessive or unreasonable in relation to the value of the services rendered. Petitioner's original position (as reflected by the indictment) was that the defendants rendered no service and therefore all the payments made were improper and wrongfully taken as a deduction in the income tax returns of the company. This was the basic fact upon which the alleged attempt and conspiracy to evade the taxes of Consensus rested.

The Evidence.

The evidence consisted of the testimony of petitioner's witnesses and documentary proof. Defendants offered no evidence.

James W. Hyland, an agent for the Bureau of Internal Revenue, testified concerning various analyses made of documents in evidence and concluded that Consensus owed the government the claimed additional taxes for the years in question. His testimony was merely a summary of the figures from the books of the company, with a complete elimination as a business expense of all sums paid defendants for commissions. He stated:

"In arriving at the tax * * * due from this company I assumed that Ragen and his son, Molasky, Kruse and his son were not entitled to one penny of commissions." (R. 439.)

Petitioner's evidence established that prior to the incorporation of Consensus it was agreed that Annenberg through Cecelia was to own Consensus and the defendants were to operate the same, for which they were to receive a certain percentage of the profits for services rendered

and to be rendered. (R. 375, 392, 416.)³ Independent of this express agreement, the defendants, irrespective of whether or not they were stockholders, would be entitled to compensation for services rendered to the company. As stated by the Circuit Court of Appeals, "We should think that the defendants would impliedly be entitled to compensation for services rendered irrespective of an express agreement relative thereto." (R. 500.)

Petitioner's evidence established that these defendants were in actual charge of the operation of this company continuously from 1929 to the time of the trial and employed by it. In its opening statement, petitioner claimed that William Molasky only performed considerable work. Counsel for the government stated:

"The defendants Arnold W. Kruse and James M. Ragen had very little if anything to do in the operation of the company's business * * * William Molasky actually ran the business and did considerable work." (R. 550.)

Petitioner here admits: "Molasky and Arnold Kruse undoubtedly did perform some services. (R. 322, 323, 326, 341, 354, 355.)" (Petition 8.)

Petitioner now contends that the record discloses that neither Ragen, Sr., Ragen, Jr., nor Lester Kruse worked for the company. In support of this unfounded statement petitioner cites the testimony of the witness Burris, a book-keeper, to the effect that he had no knowledge of any work that Lester Kruse, Ragen, Sr. or Ragen, Jr. did (Petition 8), omitting Burris' further testimony that he, Burris,

³ "The Circuit Court of Appeals said:

"Furthermore, defendants contend that there was an agreement in 1929, prior to the incorporation of Consensus, between them and Annenberg, that Cecelia should take 30% of the profits as the owner of the business, Molasky 30%, and Ragen, Sr., and Arnold Kruse each 20% as compensation for services in the operation of the company. There is testimony which sustains this contention. True, the Government argues that it is unbelievable, even though it came from Government witnesses." (R. 500.)

was not in a position to know what work they did. (R. 344.) This is far from establishing that these defendants rendered no services. The record shows that Ragen, Sr., Ragen, Jr., and Lester Kruse also performed services for the company and that all defendants were paid these commissions for such services. (R. 322, 351, 354, 355, 359, 385, 387, 388, 392.) The corporate minutes and employment contracts were of like effect. Both the trial court and the United States Circuit Court of Appeals after reviewing the evidence concluded that it disclosed that all defendants had in fact performed services and were entitled to compensation therefor.⁴ These commissions were the only compensation paid for such services.

Under the record and findings of both the trial and appellate court we must assume that defendants rendered services to Consensus for which they were paid these commissions. Petitioner concedes this court will not grant certiorari to review the record as to this question of fact. (Petition 10.)

⁴ The trial court said:

"In other words, once having shown,—and this evidence does show,—that they rendered,—some of them at least, and perhaps all of them, perhaps all of them,—that they rendered some services: Now having shown that they rendered some services and that they received these things as commissions, haven't you got to go further and show, in order to create a fraudulent intent that these commissions received were all out of proportion to the services rendered?" (R. 463.)

The U. S. Circuit Court of Appeals said:

"We think there is considerable testimony in the record of services rendered by Molasky, who was president of Consensus, as well as by Kruse, Sr., and some evidence of services performed by the other defendants." (R. 500.)

"The proof shows without doubt that they rendered services to Consensus and were entitled to compensation in the form of salary or otherwise." (R. 503.)

Law Applicable.

Petitioner as a basis for its claim that defendants attempted or conspired to evade the income tax of Consensus had the burden of establishing the limited charges of its indictment, namely, that defendants were not employees, performed no services for the company and therefore these commissions paid were improperly deducted as a business expense. From the evidence heretofore analyzed, it conclusively appears that defendants were in fact employees, performed services in the management and operation of the business for which they were paid these commissions pursuant to a bona fide agreement at the time of the corporation of the company. Further, as pointed out by the Circuit Court of Appeals, defendants would impliedly be entitled to compensation for these services.

Petitioner never claimed nor offered evidence that these commissions so paid were excessive or unreasonable in relation to the services performed by the defendants. The Circuit Court of Appeals said: "There was no proof and no effort by the government to show that the services disclosed constituted the total of those performed and no effort to show the reasonable value of such services". (R. 500.) There was no evidence in the record that any of the payments so made were improper or wrongfully taken as a deduction in the income tax returns of the company. Under these circumstances, there was a complete failure of proof to establish the charges of the indictment; the trial court erroneously denied defendants' motions for directed verdicts and the Circuit Court of Appeals correctly reversed the judgments of conviction.

Petitioner having failed to prove that the commissions paid were unreasonable in relation to the value of the serv-

ices rendered, there was no factual basis from which a jury could determine that part of the commissions so paid were compensation for services rendered and part dividends to stockholders. Petitioner accordingly argued in the Circuit Court of Appeals that there was no middle ground and that the deductions in question had to be treated either as dividends in their entirety and if so unlawful deductions, or as commissions in their entirety and therefore properly deducted.⁵

Petitioner argued below (R. 501) and argues here (Petition 15, footnote 9) that the fact that defendants rendered services to the company for which they were entitled to compensation was and is immaterial because the commissions so paid were in fact dividends in that (1) they were so described in some instances on the work sheets and reports prepared by the bookkeepers; and (2) that part of the commissions so paid were paid to certain of the defendants in the same proportion as their alleged stock holdings. The first contention is without factual support in that the bookkeepers who prepared these work sheets and weekly reports testified that where they described the payments made to the defendants as "dividends" it was pure neglect or error on their part. (R. 337, 361, 413.) The second contention is without merit in that the fact that these commissions were paid to stockholders does not make them dividends in the absence of some evidence that the

⁵ The U. S. Circuit Court of Appeals said:

"The Government in its brief and in oral argument before this Court asserts that the deductions in question must be treated either as dividends in their entirety, and if so as unlawful deductions, or as commissions in their entirety, and therefore properly deducted. In other words, in accordance with this argument there can be no middle ground." (R. 502)

payments were excessive in relation to the services rendered.

Austin v. U. S. (C. C. A. 5) 28 Fed. (2d) 676.

Wm. S. Gray & Co. v. U. S. (C. of C.) 35 Fed. (2d) 968.

Treasury Regulations.⁶

Under the above authorities even in a civil case, the basic question is always whether or not the amounts paid as compensation are reasonable in relation to the value of the services rendered. The deductions in question were proper irrespective of whether they were made to persons who were also stockholders unless the payments so made were unreasonable in relation to the value of the services performed. If unreasonable, the excessive amount and that alone may be considered as a dividend. Having failed in its proof to the effect that the sums so paid were unreasonable, petitioner's present claim that all of these payments were dividends is without factual support.

There was no factual basis from which the jury could

⁶ Regulations 19.23(a) 6.--(Reg. 163 Income Tax):

"Compensation for Personal Services-- * * * The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows: * * * (a) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services, and the excessive payments correspond or bear a close relationship to the stock holdings of the officers or employees, **it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock.** * * *

"(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. * * * (Boldface ours.)

infer, much less find, that these commissions, or any part of them were dividends. Under the undisputed facts in evidence, these commissions so paid, were not dividends as a matter of law. Petitioner's case has no support in fact or law and the Circuit Court of Appeals correctly held that the trial court erred in refusing to direct verdicts in favor of defendants.

The Erroneous Instruction of the Court.

The trial court erroneously instructed the jury that they could find all the defendants guilty if they found only that a substantial part of the commissions paid were in fact dividends. There being no evidence in the record from which a jury could make such a finding, the instruction was erroneous. It is difficult to understand upon what theory petitioner can justify this instruction in the light of its own theory that the deductions in question must be treated either as dividends in their *entirety* and if so unlawful deductions, or as commissions in their *entirety* and therefore properly deducted. As stated by the Circuit Court of Appeals:

"This statement (referring to the cited portion of the Court's instructions) was neither consistent with the indictment nor the theory upon which the case was tried." (R. 503.)

Appellee seeks to justify this instruction on the theory that the government is not required to prove an evasion of

"It is for you to decide whether these were or whether a substantial portion thereof, was a distribution of profits rather than the compensation of employees. I use the words 'these sums or a substantial portion thereof'. It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits. • • • It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern, in the amounts charged in the indictment, or substantial parts thereof, diverted them from the form of profits and received them in the form of commissions." (R. 472.)

all the tax charged.⁶ This principle of law has never been disputed. Assume A. is charged with having a certain income of \$20,000. and evading a tax of \$3,000. It is sufficient if the proof shows he has an income of \$15,000. and evaded a tax of \$2,000. This principle of law, however, has no application here. The alleged evasion of taxes in this case relates not to the *amount* of taxes but to the propriety of a specific deduction taken. The real and only issue here was whether these deductions for commissions were proper or improper in their *entirety*. Yet the jury were instructed that they could convict by finding only that a part of the commissions were properly deducted and a part improperly deducted.

Petitioner seeks to justify this instruction on the theory that the jury might have found that in some years one of the defendants rendered no services at all or that as to some of the defendants some or all the payments were profits in their entirety. (Pet. 11, footnote 6.) There was no evidence in the record from which a jury could make such a finding.

The trial court in effect instructed the jury that they could convict the defendants by finding only that part of the sums paid were for services rendered and part were dividends. This necessarily required as a basis facts from which the jury could make this determination; that is, facts from which the jury could find that part of the sums paid were for services rendered and part were dividends. Unless these facts were present the jury could not make such a determination. There being no such evidence in the record, the verdict of the jury was based on mere speculation and conjecture. The instruction in question under the indictment, evidence and theory of petitioner's case was erroneous.

⁶ *Gleckman v. U. S.* (C. C. A. 8) 80 Fed. (2d) 394; Certiorari Denied, 297 U. S. 709 (Pet. 11, footnote 6).

The above matters were fully considered by the Circuit Court of Appeals in its opinion, the problems presented were carefully analyzed, the court reached the conclusion that the trial court had erred in denying defendant's motions for directed verdict and had erroneously instructed the jury, and according reversed and remanded the case. The above analysis indicates the correctness of the conclusions of the Circuit Court of Appeals—this is particularly true in that petitioner here makes no serious contention that these ultimate conclusions of the Circuit Court of Appeals were erroneous. We now refer to the Petition for Certiorari.

The Petition for Certiorari Is Without Merit.

The original theory of petitioner's case was that the defendants were not employees of Consensus, performed no services for it and consequently, all sums paid them were in fact dividends in that certain of the defendants were stockholders of the company. If dividends they were of course not deductible as a business expense and their inclusion as such in the income tax returns of the company might well constitute a scheme or conspiracy to evade taxes. When its own evidence established that the defendants were in fact employees of the company and had rendered services for the commissions paid, the bottom fell out of petitioner's case.

From that time there have been continuous shifts of petitioner's position in a vain attempt to sustain these judgments of conviction. When faced with the fact that their own evidence established that services had been rendered, they contended that the question of services was immaterial and so contend here. When faced with the fact that they failed to show that the payments made for these services were excessive or unreasonable they claimed that under their theory the question of excessiveness or unreasonable-

ness of the payments so made was immaterial in that the commissions so paid were either commissions in their entirety and properly deducted, or dividends in their entirety and improperly deducted—that there was no middle ground.

Without questioning the correctness of the ultimate decision of the Circuit Court of Appeals, petitioner now seeks to have this court review this case on the theory that the Circuit Court of Appeals in its opinion laid down certain new principles of law, (to the effect that a criminal prosecution cannot be based on the theory only that a certain deduction is unreasonable when the statute permits a reasonable deduction), which constitute “a significant threat to the enforcement of the revenue laws.” These so-called new principles of law were not even involved in the ultimate questions decided by the court.

In analyzing this case, the Circuit Court of Appeals agreed with petitioner’s position that there was no middle ground and that the commissions so paid were either proper or improper in their entirety and pointed out that this was the theory of the indictment and further said:

“It is a serious question whether a prosecution for income tax evasion founded upon improper deductions can succeed where the proof is other than that the deductions are improper in their entirety”. (R. 502.)

The Court then said:

“Section 23(a) of the Internal Revenue Code, 26 U. S. C. A. Int. Rev. Code §23 (a) allows deductions in computing a net income for ‘all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *. The reported cases, dealing with criminal responsibility for tax evasion, are, so far as we are aware, predicated upon a failure to file a return, or if filing a return, failure to report the correct gross income. We find no case where the evasion charged was based upon an improper deduction. We have reached the conclu-

sign that where a statute permits a reasonable deduction for services, a criminal prosecution can not be maintained by proof other than that such services were not rendered. It is not sufficient to allege or prove that a deduction claimed for services is unlawful because the amount charged is unreasonable. Such a charge would leave to the trier of the facts the responsibility for fixing the standard by which a defendant's guilt would be determined. The standard would vary according to the views of different courts and juries. Such a theory would be violative of the defendant's constitutional rights, and void. *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; *Collins v. Kentucky*, 234 U. S. 634, 34 S. Ct. 924, 58 L. Ed. 1510."

Petitioner now claims that this latter statement in effect establishes some new standard of guilt (Petition 2); that it places a "wholly unwarranted limitation into Section 145b of the Revenue Act" (Petition 13), and that it prevents a prosecution for an unlawful deduction. This statement must be considered in connection with the facts before the court and in connection with the petitioner's own theory of the case which was then being dealt with. Certainly the decisions of this court cited by the lower court raise a serious question whether a criminal action can be based on the theory only that a particular deduction for salary was unreasonable under Section 23(a). Petitioner cites no cases holding to the contrary. Irrespective of the court's conclusion as to this matter, it was not pertinent to the ultimate questions decided.

Petitioner in its petition for rehearing claimed below and here intimates that this language in effect holds that a prosecution for income tax evasion cannot be based upon an unlawful deduction. That the court did not so hold is best emphasized by the illustrations which immediately follow the above quoted statement. Petitioner claims that

the opinion of the court below is in direct conflict with the case of *United States v. Kelley* (C. C. A. 2), 105 Fed. (2d) 912, which involved unlawful deductions. In the *Kelley* case defendants took certain deductions based on a fabricated inventory and repeated deductions in successive years for the same bad debt, these deductions being false *in toto*. Petitioner intimates that in connection with the fabricated inventory there was some question of reasonable value involved (Petition 12). The facts were that the government proved that in the fabricated inventory the defendants placed a valuation on the cars, wagons and animals in excess of their actual cost. (See 105 Fed. (2d) 915.) The *Kelley* case in no way conflicts with the decision of the court below in this case; in fact, it comes squarely within the illustrations contained in the court's opinion. Petitioner also refers this court to the case of *In re Zimmerman*, (C. C. A. 7), 108 Fed. (2d) 370. The opinion in that case was written by the same judge who wrote the opinion in this case and there are no similar questions in these two cases present here. The court below specifically recognized that a tax evasion case could be based on an unlawful deduction. (R. 503.)

Petitioner picks out certain portions of these statements by the court and then draws the far-fetched inference that they laid down some new principle of law, wholly ignoring their application to the issues in this case. Typical of this is the following:

Petitioner states:

"The court below, however, ruled in terms (R. 502) that 'where a statute permits a reasonable deduction for services a criminal prosecution cannot be maintained by proof other than that such services were not rendered.' " (Petition 10.)

Certainly this statement is clearly applicable to the record in this case. Under the pleadings here petitioner's theory was that the defendants had rendered *no* services.

Petitioner refers to various provisions of the Internal Revenue Code, permitting "reasonable" deductions (Petition 13, footnote 8) and then argues as follows:

"The department in its prosecution policy has not considered that wilful tax evasion was exempt simply because tax items were involved as to which honest men might differ." (Petition 14.)

Be that as it may, this court has specifically held in the very cases cited by petitioner and referred to by the Circuit Court of Appeals, that a criminal prosecution could not be based on any such theory.

Petitioner not only failed to prove that any of the deductions in question were excessive or unreasonable but further claimed that proof on these questions was immaterial in that these deductions were either proper or improper in their entirety. Under these circumstances, petitioner should not now be entitled to certiorari on the claim that the statement of the court below, that it is a serious question whether a tax evasion case could not be based only on the theory that a deduction was unreasonable where a statute permitted a reasonable deduction, was inaccurate. The accuracy or inaccuracy of the statement criticized cannot and does not under the issues here affect the ultimate decision of this case. This case was reversed and remanded on the theory that petitioner's evidence was insufficient and that the jury was not correctly instructed. It was not reversed on the theory that petitioner's proof, that certain deductions were unreasonable, did not constitute a crime. If this were true the case would not have been remanded. **Petitioner asks this court to review this case on a principle of law not even involved in the case.**

Conclusion.

The Circuit Court of Appeals carefully analyzed the real issues in the case and correctly disposed of them adversely to petitioner. Petitioner does not contend here the ultimate decision of the Circuit Court of Appeals was erroneous. The petition for certiorari is just another shift in position on the part of petitioner in an attempt to sustain a judgment of conviction, which has no foundation in law or in fact.

We respectfully submit that the petition for certiorari should be denied.

GEORGE K. BOWDEN,

Attorney for Respondents, Arnold

W. Kruse and Lester A. Kruse.

WARREN CANADAY,

JOSEPH A. STRUETT,

Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 55-56

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

ARNOLD W. KRUSE,

Respondent.

THE UNITED STATES OF AMERICA,

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Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

INDEX.

| | PAGE |
|---|------|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 3 |
| The Indictment | 5 |
| The Facts | 10 |
| Contested Issues | 12 |
| Summary of Argument | 13 |
| Argument | 14 |
| I. The trial court erred in denying defendants' motions for directed verdicts in that there was no substantial evidence submitted by the government establishing defendants' guilt .. | 14 |
| II. The trial court erroneously instructed the jury | 21 |
| III. The Opinion of the Circuit Court of Appeals | 24 |
| Conclusion | 32 |
| Appendix I | 35 |
| An Analysis of the Facts | 35 |
| I. Organization, Operation and Books of Consensus | 35 |
| II. The Work Sheets and Weekly Reports of Consensus | 38 |

| | |
|--|----|
| III. Herbert S. Kamin; his status, duties and activities; the destruction of the original stock book and certificates; the issuance of all the stock of Cecelia; the preparation and predating of the corporate minutes; the preparation and predating of the employment contracts; and execution of the income tax returns of Consensus | 40 |
| IV. All defendants performed services for these commissions | 50 |
| V. The amount of taxes claimed to be evaded | 53 |
| VI. The audits of the income tax returns of Consensus by Revenue Agents | 55 |
| VII. Defendants not only received all these commissions for their own benefit but paid income taxes on same | 57 |
| Appendix II | 58 |
| Petitioner's evidence was insufficient to justify a finding that defendants were stockholders of Consensus | 58 |
| Appendix III | 62 |
| Statutes and Treasury regulations .. | 62 |

CITATIONS.

Cases:

| | |
|---|--------|
| Austin v. U. S., 28 Fed. (2d) 677 | 15 |
| Cartello v. U. S., 93 Fed. (2d) 412 | 58 |
| Cox v. U. S., 96 Fed. (2d) 41 | 59 |
| Crawford v. U. S., 212 U. S. 183 | 24 |
| Wm. S. Gray & Co. v. U. S., 35 Fed. (2d) 968 | 15 |
| Gunning v. Cooley, 281 U. S. 90 | 59 |
| Helvering v. Wood, 309 U. S. 344 | 19, 25 |
| Hickory v. U. S., 160 U. S. 408 | 49 |
| Jackson v. State, 12 Okla. Crim. 446 | 59 |
| Omaechevarria v. Idaho, 246 U. S. 343 | 28 |
| Reviera v. U. S., 57 Fed. (2d) 816 | 59 |
| U. S. v. Cohen Grocery Co., 255 U. S. 81 | 28 |
| U. S. v. Cruickshank, 92 U. S. 542 | 7 |
| U. S. v. Young, 97 Fed. (2d) 200 | 41 |

Statutes:

Internal Revenue Code:

| | |
|--|------------|
| Sec. 23 (26 U. S. C. A. (23(a))) | 17, 29, 62 |
|--|------------|

Revenue Act of 1932, 47 Stat. 169:

| | |
|----------------|-------------|
| Sec. 23 | 17, 29, 62 |
| Sec. 145 | 28, 31, 145 |

Revenue Act of 1934, 48 Stat. 680:

| | |
|----------------|----|
| Sec. 23 | 62 |
| Sec. 145 | 62 |

Revenue Act of 1936, 49 Stat. 1648:

| | |
|----------------|----|
| Sec. 23 | 62 |
| Sec. 145 | 62 |

Miscellaneous:

| | |
|---|----|
| Treasury Regulations 77, Art. 126 | 63 |
| Treasury Regulations 86, Art. 23(a)-6 | 63 |
| Treasury Regulations 94, Art. 23(a)-6 | 63 |

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

Nos. 55-56.

THE UNITED STATES OF AMERICA,
Petitioner,
vs.

ARNOLD W. KRUSE,
Respondent.

THE UNITED STATES OF AMERICA,
Petitioner,
vs.

LESTER A. KRUSE.
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 487-505) is reported in 118 F. (2d) 128.

JURISDICTION.

The judgments of the Circuit Court of Appeals were entered February 26, 1941 (R. 505-507). The petition for writs of certiorari was filed April 22, 1941, and granted June 2, 1941 (R. 511). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court.

QUESTIONS PRESENTED.

Petitioner states the principal question presented is whether there is a sufficiently definite standard of guilt for the jury to convict, *if any of the distributees rendered any services at all to the corporation* (Brief 2). That question is not presented by the facts in that *petitioner's evidence established that all defendants rendered services to the corporation for which they were paid these commissions*. The questions presented to the court below and presented here are whether or not the trial court erred in refusing to direct verdicts for the defendants and whether the trial court erroneously instructed the jury.

STATUTES AND REGULATIONS INVOLVED.

The relevant provisions of the statutes and regulations involved are set forth in the Appendix II, *infra*, pp. 62-63.

STATEMENT.

Continuously from October 1929 up to the time of this trial (September, 1940), the Consensus Publishing Company paid 70% of its net profits weekly to Molasky, Kruse or Kruse, Jr., Ragen or Ragen, Jr., for services rendered to it. These payments were charged on its books, regularly kept, as commissions ~~and taken as~~ a deduction for business expenses in every income tax return of the company. The *sole* basis of petitioner's claim of an attempt or conspiracy to evade the taxes of Consensus is the alleged impropriety of these deductions.

The theory of this case, as it was tried and presented to the court below, was that these commissions were in their entirety distributions of dividends to stockholders, as distinguished from compensation for services rendered.¹

The principal question presented to the court below was whether or not petitioner's evidence considered as a whole (defendants having offered no evidence) was sufficient to be submitted to a jury. The other question relating to an erroneous instruction need only be considered if the first question is answered in the affirmative.

Petitioner's evidence taken as a whole contains many conflicts. The testimony of some witnesses is inconsistent with the testimony of others; many conflicting hypotheses and inferences can be drawn from this evidence, particularly as to the question whether these defendants were in

1. Throughout this record it is frequently stated that the question is whether the sums paid defendants were "dividends" or "commissions". This is a rather loose and confusing terminology. We believe it may be safely stated that where these terms are so used, in contradiction of each other, it was the intention of all parties that the word "dividends" should be construed as a distribution of dividends as such to stockholders of Consensus and not a proper expense deduction, and the term "commissions" should be construed as a payment of compensation for services rendered and a proper expense deduction in the income tax returns of the company. (See Court's Instructions, R. 470.)

fact stockholders of Consensus or held this stock as dummies for Annenberg. There is evidence in the record from which a jury could make either inference. Under these circumstances petitioner failed to meet its burden of proof on this subject. (Appendix II, *infra*, pp. 58-61.)

Petitioner discusses those facts favorable to it; ignores those favorable to defendants; singles out isolated portions of a witness' testimony as establishing a fact and fails to refer to other portions which destroy the very fact petitioner states. One illustration: Petitioner refers to the testimony of one Sweig as establishing that the business was simple, and that the printing of these sheets took but a few hours (Brief 5); Sweig's testimony referred to the character of the business before it was even acquired by Consensus (R. 320, 321). Such facts as are discussed are continuously misstated, loosely stated, or half stated, which enables petitioner without difficulty to draw many unfounded conclusions as a basis for its ultimate conclusion that there was ample evidence to justify the jury's verdict. It is only by considering petitioner's evidence in its entirety that this court can determine whether the court below applied some erroneous "standard of guilt" or whether the court below was guilty of "a flagrant invasion of the province of the jury" as petitioner infers (Brief 20). Petitioner concedes that a reviewing court has the right to determine whether the verdict is supported by substantial evidence (Brief 20).

Under these circumstances it is necessary for us to make a full, accurate and detailed analysis of the facts (Appendix I, *infra*, pp. 35-57). In this analysis we shall endeavor to dispose of petitioner's factual contentions by pointing out its misstatement of facts and unfounded conclusions. We shall state the facts which justified the conclusions of the court below. After analyzing the indictment, we shall refer to certain ultimate facts and then present our argument.

THE INDICTMENT.

The indictment (R. 2-27) consists of five counts, the first four counts charging an attempt to evade taxes for the respective years 1933 to 1936. These counts allege that Consensus had a gross income for the particular year of a certain amount, was entitled to certain specific deductions under the Revenue Act (omitting all sums paid defendants as commissions for services rendered), had a taxable income upon which a certain tax was due; that to defeat and evade income taxes of a certain specified amount defendants filed an income tax return for the particular year showing a certain gross income, claiming certain deductions (which included the commissions paid), leaving a taxable income of a lesser amount upon which the proper taxes were paid. All items of gross income and deductions claimed by the government to be proper are identical with those set forth on the books of the company and in its income tax returns. Mathematical computation discloses that the alleged taxes sought to be evaded are arrived at only by the complete elimination of the deductions for these commissions and the allowing to the defendants nothing for their services. None of these counts contains any allegation charging that the deductions for these commissions were improper or why they were improper.²

The conspiracy or fifth count covers all the years in question (1929 to 1936) and is in effect similar to the substantive counts, namely, the taxes alleged to have been evaded exist only by the complete elimination of these commissions paid defendants. We have construed this count to allege that the deductions for these commissions were improper, in that defendants were not employees of

2. These counts contain no allegations to the effect that these deductions "were in fact dividends or distribution of profits" as petitioner asserts on pages 3 and 17 of its brief.

the company and rendered no services to the company but were owners of a beneficial interest therein (stockholders) and the sums paid them as commissions were in fact dividends.³ Petitioners petition for certiorari states: "Count 5 of the indictment, it is true, alleges that none of the defendants performed any services for Consensus (R. 23)." (p. 15, footnote 9.) Petitioner now claims the indictment contains no such allegation (Brief 15, 31, 33).

The only charge in this indictment, as to any evasion of taxes or conspiracy to evade, was the deduction as a business expense of the commissions so paid defendants. The only allegation as to the impropriety of these payments appears in the conspiracy count. No claim is advanced anywhere by petitioner that these payments were excessive or unreasonable in relation to the value of the services rendered. Petitioner's original position (as reflected by the indictment) was that the defendants rendered no service and therefore all the payments made were improper and wrongfully taken as a deduction in the income tax returns of the company. This was the basis of the alleged attempt and conspiracy to evade the taxes of Consensus.

The Circuit Court of Appeals recognized this and stated:

"It was directly alleged in the conspiracy count of the indictment and impliedly in the other counts that none of the defendants 'rendered any services to the said corporation'." (R. 502.)

3. "as the said defendants and each of them then and there well knew, the said defendants (referring to Molasky, Ragen, his son, Kruse, and his son,) would not in fact be, nor were they, employed in an executive capacity or in any capacity whatsoever by the said corporation by virtue of said 'employment contracts' during the said calendar years 1929 to 1936, both dates, inclusive, nor would they, nor did they, nor any of them, nor any one else for them, render any services to the said corporation by virtue of the aforementioned 'employment contracts' but that in fact, they, the said defendants, would be, and were, owners and holders of beneficial interests for themselves and others in the said corporation and all of the moneys to be paid and which were paid to them, and each of them by virtue of the said so-called 'employment contracts' would be and were, in truth and in fact, distributions of profits and dividends from earnings of the said corporation." (R. 23.)

Petitioner on page 31 of its brief takes issue with this conclusion of the Circuit Court of Appeals: correctly asserts that there was no mention made of services in the four substantive counts and further claims for the first time that the conspiracy count alleged only that none of the defendants performed any services for the corporation *by virtue of the so-called employment contracts*. These confusing allegations about employment contracts, services and dividends are negative pregnant. Defendants may well have been employed and rendered services and the deductions of these commissions may well have been proper irrespective of the "employment contracts." If this construction be correct there is nothing to the conspiracy count other than the general allegation of a conspiracy to evade taxes without any facts showing what the conspiracy consisted of aside from the claimed taxes due by the complete elimination of all commissions paid. This count in effect is then similar to the substantive counts.⁴

We urged in the court below and urge here that since the four substantive counts contain no allegations showing wherein the deductions for commissions were improper they set up no cause of action and fall squarely within the ruling of this Court in the case of *U. S. v. Cruickshank*, 92 U. S. 542, 557. If the conspiracy count be given the construction now contended for by petitioner it is likewise fatal under the same decision.

Certainly the charges of this indictment are general and allege only that the attempt and conspiracy to evade the taxes of Consensus was by the deduction of commis-

4. Obviously the plain intent of the plea was to charge that the defendants rendered no services to the company, therefore the deduction of these commissions as a business expense was improper. Petitioner's own evidence having established that defendants rendered services to the company for which they were paid these commissions and petitioner having offered no proof to show that the payments so made were not just compensation for such services; petitioner, in a desperate attempt to avoid this situation, now, for the first time, contends that when it alleged that defendants rendered no services to Consensus, it meant that defendants rendered no services under the "employment contracts."

sions as an expense. Petitioner's theory was that these deductions were improper in that they were dividends as such to stockholders (Brief 3, 17). The burden of proof rested on the government to establish that these deductions were in fact dividends, in whole or in part, that their deduction as a business expense was unlawful and improper and that Consensus owed for the years in question all or part of the taxes claimed.

Petitioner, at the time of the motion for a directed verdict, conceded that before it was entitled to have its case submitted to the jury, its evidence had to establish that Consensus owed the government additional taxes.⁵ These additional taxes asserted to be due under the charges of the indictment could arise only if the deductions for these commissions were improper in whole or in part.

Having this burden of proof, under what legal theories could these commissions be dividends and their deduction in the income tax returns of Consensus be improper with the result of additional taxes owed by Consensus:

1. Petitioner claims that they were dividends because they were paid to stockholders in the same proportion as their stock holdings. As pointed out by the Circuit Court of Appeals, this does not necessarily follow and any presumption in this respect would be overcome by proof that services were rendered for which the disbursements were made or could have been made (R. 439). Petitioner does not dispute this legal conclusion of the court below.

5. "The Court: Well, this jury has got to say, first of all that the income taxes of the Consensus Company haven't been paid.

"Mr. Ziffren: Quite right, your Honor.

"The Court: Yes, that is the first essential.

"Mr. Ziffren: That is right, your Honor. * * *

"The Court: In a civil case we have the very same issue first. The very first issue that the court has to decide in a civil suit is this: Is there a shortage in income taxes? Without reference to its amount, is the method of accounting wrong, has there been a failure to pay the tax which was due? Now, that question is in both cases, in a civil suit as well as in this.

"Mr. Ziffren: Yes, sir." (R. 461).

2. Under the law and treasury regulations these payments, assuming they were paid to stockholders for services, do not constitute dividends unless the payments made were excessive or unreasonable in relation to the services performed. Then only the excessive payments would constitute "dividends."

3. That defendants, the recipients of these commissions, rendered no services to Consensus.

Assuming the conclusion of the Circuit Court of Appeals is correct, before these deductions could constitute dividends, petitioner had to establish either that they were unreasonable compensation or that defendants rendered no services. The last theory was the basis of its indictment, and the theory upon which it proceeded to trial.

THE FACTS.

We do not propose here to enter into a detailed discussion of the facts and shall only point out the following:

1. Petitioner's evidence established that prior to the organization of Consensus, it was agreed that Annenberg through Cecelia was to own Consensus and that these defendants were to receive these commissions for services to be performed; that the stock of Consensus was incorrectly issued and the defendants were never stockholders of Consensus in the true sense but merely dummies for Annenberg. This clearly appears from our analysis of the testimony of Clark (*Infra*, p. 35) and Kamin (*Infra*, pp. 40-49). In Appendix II we review the evidence on this subject and point out that under well established principles of law petitioner's evidence was insufficient to be submitted to the jury on the question whether or not defendants were stockholders of Consensus. The court below was not justified in finding that defendants were stockholders. (R. 499.)

2. Petitioner alleged that none of the defendants rendered services to Consensus for these commissions. Its evidence established that all defendants rendered services to Consensus for which they were paid these commissions. The trial court so found (R. 463) and the Circuit Court of Appeals so found (R. 500, 503). Petitioner did not establish that only some of the defendants rendered services and that the others at the most rendered fragmentary services as petitioner claims throughout its brief. For analysis of this, see Appendix I, heading "All defendants performed services for these commissions." (*Infra*, pp. 50-53.)

3. Petitioner offered no evidence to show that these commissions paid were unreasonable in relation to the services rendered and made no effort to show that the services disclosed constituted the total of those per-

formed. The Circuit Court of Appeals so concluded (R. 500) and petitioner does not question this conclusion.

From this further analysis, assuming our statement of facts to be correct, petitioner failed to prove that these deductions were dividends in whole or in part or that they were improper.

CONTESTED ISSUES.

Aside from the question as to the sufficiency of the indictment and each count thereof, the issues presented to the court below and to this court are whether or not the trial court erred in overruling defendants' motions for directed verdicts both at the close of the government's evidence and at the close of all the evidence (R. 236); and whether the trial court erred in instructing the jury that the government was only required to prove that a substantial amount of the deductions taken for commissions was improper (R. 471), in view of the fact that the trial court had in effect charged the jury that the vital question in the case was whether these payments *in their entirety* constituted a business expense or a distribution of profits to shareholders. The issue presented to the jury related to the *character* of the deductions as such rather than as to their *amount*.⁶

This case also presents the issue, whether petitioner, in an effort to sustain a conviction of a trial court, can shift its position in this court and advance arguments contrary to those advanced both before the trial court and the court below.

6. The trial court in its charge stated:

"Now this charge centers about one list of items" (R. 469).

"So it is a vital question in this case of whether the Consensus Company was entitled to deduct from its income the sums distributed to the defendants as ordinary and necessary expenses of its business. The question is whether it should not rather have reported that those distributions were distributions of the profits of the company to its shareholders rather than the payment of compensation to employees and about that this whole case centers" (R. 470).

SUMMARY OF ARGUMENT.

I. The trial court erred in denying defendants' motions for directed verdicts in that petitioner failed to prove that the deductions in question were improper in whole or in part. Petitioner's evidence established that these commissions were paid defendants for services rendered and petitioner offered no evidence to show that the payments so made were excessive or unreasonable for said services. Petitioner did not establish the allegations of its indictment that defendants rendered no services—its evidence established just the contrary.

II. The case was submitted to the jury on the theory that the deductions of these commissions were either proper or improper in their entirety and that this was the issue in the case. The trial court erroneously instructed the jury that they could convict the defendants if they found only that a substantial portion of these deductions were improper. There was no evidence in the record to support such a finding or instruction.

III. Petitioner's criticism of the opinion of the Circuit Court of Appeals is based on a misstatement of the issues and its own evidence. The factual conclusions of the Circuit Court of Appeals are substantiated by the record. The principles of law which it applied were applicable to these facts. Its ultimate legal conclusions are substantiated by the record.

ARGUMENT.

INTRODUCTION.

It is extremely difficult to logically follow the sequence and argument in petitioner's brief. We have determined that this brief can best be answered by presenting our theory of this case on the two main issues. This will of itself dispose of many of petitioner's contentions. Under a separate heading, entitled "The Opinion of the Circuit Court of Appeals" we shall dispose of petitioner's remaining contentions.

I.

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTIONS FOR DIRECTED VERDICTS IN THAT THERE WAS NO SUBSTANTIAL EVIDENCE SUBMITTED BY THE GOVERNMENT ESTABLISHING DEFENDANTS' GUILT.

This argument is based on the premise that defendants were stockholders. As a matter of fact, petitioner's evidence was wholly insufficient to justify a finding that defendants were stockholders (Appendix II, *infra*, pp. 58-61). If defendants were not stockholders, there is no question of dividends involved. Assuming defendants were stockholders, it does not follow that the sums paid them were dividends, that the deductions taken were improper, or that Consensus owed any taxes. In this case, the only theory upon which petitioner can seek to justify the verdict of the jury was its original theory, as alleged in its indictment, namely, that defendants rendered no services to Consensus.

After concluding that the defendants were stockholders, the Circuit Court of Appeals said:

"The fact that the disbursements were made to the

defendants in the same proportion as their stock holdings constitutes the Government's major argument that such disbursements were dividends. This does not necessarily follow. *Austin v. United States*, 28 Fed. (2d) 677. In fact any presumption in this respect would be overcome by proof that services were rendered for which the disbursements were made or could have been made." (R. 499.)

Petitioner takes no issue with this conclusion. The law and the treasury regulations indicate that the real test, whether sums paid by a corporation ostensibly for services are a proper deduction, is whether the sums paid and taken as a deduction were in fact compensation for services and were in fact reasonable compensation for such services. This rule would apply irrespective of whether the payments are made to stockholders as such, although the question usually arises in small corporations where substantial payments are made to stockholders.⁷

Petitioner does not squarely state the broad proposition that since the payments made defendants were in the same proportion as their alleged stock holdings they constituted dividends as a matter of law—such is not the law. What additional facts does petitioner rely on? The only other facts, which we can find in petitioner's brief which

7. *Austin v. U. S.* (C. C. A. 5), 28 Fed. (2d) 677. *Wm. S. Gray & Co. v. U. S.* (C. of C.), 35 Fed. (2d) 368.

Treasury Regulations 19.23(a) 6.—(Reg. 103 Income Tax):

"*Compensation for Personal Services*—• • • The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows: • • • (a) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services, and the excessive payments correspond or bear a close relationship to the stock holdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock. • • •

"(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. • • •" (Italics ours.)

it relies on and refers to as "substantial and cogent evidence that the payments in fact were dividends," are those set forth on page 9 of its brief. We shall take them up in turn.

1. Petitioner refers to the fact that the work sheets and weekly reports in certain instances referred to these as dividends.

The record indicates that this was an error on the part of the bookkeepers. (Appendix I, *infra*, pp. 38-39.)

2. Petitioner refers to the fact that Molasky and his niece reported these distributions as dividends from 1933 to 1935.

Molasky from 1929 to 1933 and again in 1936 and the others at all times reported these commissions as compensation for services rendered and paid income taxes on that basis.

3. Petitioner refers to a certain letter from a bookkeeper to Molasky dated December 21, 1933, stating that "no dividend checks would be issued".

It is hard to see how this is binding on defendants, particularly in the light of Government's Exhibit 70, Molasky's reply thereto under date of January 4, 1934, wherein Molasky discusses several other companies wherein he was entitled to dividends and refers to the payments from Consensus as commissions. (Rec. 332.)

4. Petitioner states that Kruse advised the bookkeeper "that the division among the **stockholders** was an arbitrary arrangement (Rec. 342-344)."

If petitioner intends to imply that Kruse used the word **stockholders** the record does not so indicate. It was an arbitrary arrangement. The witnesses testified, "Kruse said it was an amount fixed by Annenberg at the time the company was started". (Rec. 344.)

Does petitioner contend that these facts, when correctly stated, constitute "substantial" evidence that these payments were dividends? None of these facts even remotely tend to show that the sums paid were dividends, or intended to be dividends.

This leads petitioner back to its "major" argument that these payments were dividends because they were paid in the same percentages as stock holdings. This of itself was insufficient. Petitioner, having established that all defendants had rendered services for these commissions, had to further prove that these commissions were unreasonable or excessive.

Section 23(a) of the Internal Revenue Act allows as a deduction,

"all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services rendered." 26 U. S. C. A. (23a).

It logically follows that the deductions of these commissions, as a business expense in the income tax returns of Consensus, were only and could only be improper (dividends under petitioner's theory) if the amounts paid were excessive or unreasonable in relation to the services rendered. But this is not a civil case, it is a criminal case. Respondents in the court below urged that under the case of *United States v. Cohen Grocery Co.*, 255 U. S. 81, and similar cases that petitioner could not establish a crime by merely proving (which it did not) that the commissions paid were unreasonable in relation to the services rendered; that petitioner did not prove that defendants rendered no services; and that the only other possibility of attack against these deductions would be a claim that the deductions were so unreasonable in relation to the services rendered as to constitute a fraud. Respondents then pointed out that there was no such evidence in the record.⁸

8. From our brief in the court below (page 46):

"In the light of the above cases (referring to the *Cohen Grocery* case, et al.), the government in a criminal case cannot establish a crime by merely proving (which it did not) that the commissions paid and taken as a deduction were unreasonable in relation to the value of the services rendered. It had to prove by substantial evidence beyond a reasonable doubt that these deductions were improper for some other or different reason. The indictment alleged that the de-

As stated by the Circuit Court of Appeals:

"There was no proof and no effort by the government to show that the services disclosed constituted the total of those performed and no effort to show the reasonable value of such services," (Rec. 590).

Petitioner does not dispute this statement. It offered no evidence to prove that the payments of these commissions were excessive or unreasonable in relation to the services rendered, if this of itself be sufficient. It certainly offered no evidence to show that the commissions paid were so disproportionate to the services rendered as to constitute a fraud. It follows that petitioner's proof did not therefore show that these deductions were improper, in whole or in part, under the theory that they were unjust compensation for services rendered or that they were dividends. By the same token, petitioner did not prove that Consensus owed the Government any taxes in whole or part for the years in question. Before there could be a crime there had to be a tax liability; petitioner established none.

Under petitioner's evidence, the only remaining basis, for a claim that these deductions were improper, was the one first advanced by petitioner, namely that the defendants rendered no services for the sums paid them. This was the theory of the indictment, conspiracy count only, and petitioner's proof showed just the opposite.

Petitioner, faced with this record at the time of the motions for directed verdicts, took the position that the question of services and their value was immaterial. It argued that its evidence was sufficient to go to the jury on the broad

ductions were improper in that the defendants rendered no services to the company. Not only did the proof fail to establish this fact but it established just the contrary. The only other possibility of attack against the deductions in question would be, a claim that the commissions paid were so disproportionate to the value of the services rendered as to *prima facie* constitute a fraud. There is no such evidence in the record. The Government failed to prove these deductions were improper—hence failed to prove the first requisite of their case, viz., that there were any taxes due from Consensus."

question whether or not these deductions as such constituted dividends or commissions. The trial court then permitted the case to go to the jury on this theory only. See colloquy of court and counsel (Rec. 457 to 466). The only issue presented to the jury was whether this item of deductions constituted dividends as such or represented compensation for services (Rec. 470-471).

Petitioner in the Circuit Court of Appeals sought to sustain these judgments on the same theory. Petitioner admitted that this item of deductions must be treated as dividends in their entirety and if so unlawful deductions, or as commissions in their entirety and therefore proper deductions,—that there was no middle ground (Rec. 502). For discussion of this see *infra*, pp. 24-25.

Petitioner's theories, upon which it was permitted to submit its case to the jury, and which it urged in the court below to sustain these judgments, was that the question of services and their value was immaterial in that these deductions were either dividends in their entirety or compensation for services. These theories were advanced because of the deficiencies in the record. Petitioner here shifts its position. It misstates the record as to the services performed by all defendants and claims that its evidence established that certain of the defendants rendered *no* services. It then urges in this court for the first time that its theory of this case was and is that part of these deductions were dividends and part were commissions and the jury was justified in so finding (Brief 32-33). Petitioner should not now be permitted to shift its position. *Helvering v. Wood*, 309 U. S. 344, 349.

Petitioner on page 19 of its brief refers to certain facts as amply supporting the verdict of the jury. We discuss these in turn:

1. "The essential operations of the company were

simple and were carried on largely by part time employees."

This is based on the testimony of Sweig as to condition of the business prior to the time it was acquired by Consensus. (Rec. 320-321.)

2. "The fact that at least some of the defendants rendered no services at all, or at best, only fragmentary services."

This is not the fact. Appendix I, *infra*, pp. 50-53.

3. "The fact that all the profits of the enterprise were distributed weekly in exact proportion to stock ownership."

This does not establish as a matter of law that these commissions were dividends. Any presumption which might attach thereto is destroyed by other factors in the case. *Supra*, pp. 14-15.

4. "The fact that the bookkeepers worksheets and weekly reports in certain instances referred to these disbursements as dividends."

This is answered. Appendix I, *infra*, pp. 38-39.

5. "The fact that Molasky and his niece actually reported the disbursements as dividends."

This has been answered. *Supra*, p. 16.

6. "The fact that the defendants participated in the destruction of critical documents and in the execution of spurious predated contracts of employment."

This is answered. Appendix I, *infra*, pp. 48-49.

On these facts petitioner concludes that all these

"furnish overwhelming support for the jury's conclusion that the 'commission device' was wilfully employed as a means for distributing corporate earnings."

These are the only facts most of them unsupported in the record that petitioner can gather from this record to sustain the verdict of the jury. Does it consider these facts "substantial"?

Under the law and the facts, the petitioner's evidence was wholly insufficient to be submitted to the jury. The Trial Court erred in refusing to direct a verdict for the defendants, both at the close of petitioner's case and at the close of all the evidence.

II.

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY

After instructing the jury that its charge centered about one list of items; that they were to determine whether the sums so paid as commissions were in fact paid for services rendered or were in fact paid as a distribution of profits or dividends, and that about this the whole case centered, the Trial Court, over defendants' objections erroneously advised the jury in part:

"* * * It is for you to decide whether these were, *or whether a substantial portion thereof*, was a distribution of profits rather than the compensation of employees.

I use the words 'these sums *or a substantial portion thereof*'. It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits. * * * It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern, in the amounts charged in the indictment *or substantial parts thereof*, diverted them from the form of profits and received them in the form of commissions. That, as I said, comes back always to the ultimate question that you have got to decide." (Rec. 471. (Italics ours.)

Petitioner states that

"viewed as a whole, as of course it must be, the charge was exceedingly thorough and fair." (Brief 33.)

While the Circuit Court of Appeals indicated that considered in the light of the entire charge "this particular portion of the charge appears less harmful," we submit that, when considered in connection with the entire charge, its erroneous character is magnified.

The Trial Court did not comment on the facts and its instructions were of a most general nature. The Trial Court had previously instructed the jury that the case

centered about *one list of items*, that is, of course, the deduction of these commissions; and further had told the jury that they were to determine whether these commissions were in fact paid for services rendered or were a distribution of dividends to stockholders. There can be no question from an examination of the entire charge that the Trial Court submitted this case to the jury on one theory and one theory only, namely, that these commissions were either proper or improper in their entirety. This instruction, considered in relation to the entire charge and coming as it did near the end of the charge, was in effect a *peremptory* instruction. It in effect advised the jury, that if they found that a substantial portion of the sums paid as commissions were not in fact paid as compensation for services but were dividends, this would be sufficient to find the defendants guilty.

There was no evidence in the record from which the jury could find that part of the sums paid were in compensation for services rendered and part were dividends. Petitioner offered no evidence to show that the sums paid as commissions were unreasonable in relation to the service rendered. Under what conceivable theory of law could the jury be permitted to speculate, conjecture or find that part of these commissions represented dividends and part payment for services rendered on a record barren of any facts upon which to base such a finding. The criticized instruction was inconsistent with the entire theory upon which the case was submitted to the jury. As well stated by the Circuit Court of Appeals:

"The jury was thus advised in effect that in order to convict it was only necessary that a substantial portion of the profits of Consensus were distributed to the defendants as dividends. This statement was neither consistent with the indictment nor the theory upon which the case was tried. * * * Who can say but that the jury might well have reasoned that the dis-

tributions made to the defendants were partly for services rendered and partly for profits in the form of dividends, but that the latter constituted a substantial portion and was, therefore, the guide by which they arrived at a verdict of guilty." (R. 503, 504.)

Petitioner seeks to justify this instruction on the theory that the Government is not required to prove an evasion of all the tax charged. (Brief, p. 24.) This principle of law has never been disputed. Assume A is charged with having a certain income of \$20,000 and evading a tax of \$3,000. It is sufficient if the proof shows he has an income of \$15,000 and evaded a tax of \$2,000. This principle of law, however, has no application here. Under the facts here there was no dispute as to the *amount*. The dispute related to the deduction of a certain *item*. The case was submitted to the jury on the theory that the whole case centered about the deduction of this item and that the question was whether the sums paid were paid as dividends to stockholders or compensation for services. The case was submitted to the Circuit Court of Appeals on practically the same theory. As heretofore stated there was no evidence in the record from which the the jury could find that part of the sums paid were compensation for services and part dividends to stockholders.

Petitioner further seeks for the first time to justify this charge on the theory that the instruction in question was requisite to a fair and complete charge in that its evidence presented certain problems as to the guilt or innocence of certain defendants in certain years. (Brief, p. 34.) Aside from the fact that these contentions are without record support and contrary to the theory upon which petitioner's case was submitted for the jury, these problems, if they existed, should have been covered by specific instructions as to specific defendants for specific years.

Petitioner in a further attempt to sustain this erroneous

instruction suggests that there is some question as to whether or not the exception was sufficient. (Brief, p. 34; footnote 1.) The exception was sufficient. The instruction in question was so erroneous under the facts herein and the theory upon which this case was submitted to the jury that any court of review would consider same even though no exception whatsoever was taken. *Crawford v. United States*, 212 U. S. 183, 194.

III.

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The question here presented is whether the ultimate decision of the Circuit Court of Appeals was correct. It is likewise of extreme importance to petitioner, even if that decision be correct, that the court's opinion should not contain any erroneous conclusions which might severely handicap petitioner in the future enforcement of the revenue laws. Our analysis of the facts and our discussion of the two main issues with repeated reference to the opinion indicates the thorough conscientious care of the court below in passing on these issues. Practically every question raised by either party was seriously and fully considered and disposed of in accordance with the court's best judgment.

The court having analyzed the facts, then took up the questions of law applicable to these facts and first stated:

"The government in its brief and in oral argument before this court asserts that the deductions in question must be treated either as dividends in their entirety and if so unlawful deductions, or as commissions in their entirety and therefore properly deducted. In other words, in accordance with this argument, there can be no middle ground". (Rec. 502.)

Petitioner here for the first time questions this statement of the court and says: "We respectfully assert that the

government made no such contention; it did not rely upon any such 'all or nothing' theory." (Brief 32.)⁹

This is a plain shift from the position taken by the petitioner before the trial court and in the Circuit Court of Appeals (*supra*, p. 19). This it is not permitted to do. *Helvering v. Wood*, 309 U. S. 344, at 349. The purpose of this shift is obvious. Petitioner's evidence established

9. It is significant that this statement of the court below was not questioned in petitioner's petition for rehearing. Petitioner took the same position as it had taken before the court below (Pet. for Rehearing, page 13).

Petitioner's brief in the court below, stated at page 82.

"On the basis of the foregoing, it is respectfully submitted that there is no issue involved in this case regarding the question of whether commissions may be deducted; or whether the payments were reasonable. We cannot repeat too often that there are no questions concerning commissions, because these payments were dividends."

As to the oral argument, a government reporter was present and the argument of petitioner was transcribed. When we directed the Solicitor General's attention to this statement appearing in his brief he promptly made available to us this transcript. We have examined same. We have suggested to the Solicitor General that the statement appearing in his brief and its argument based thereon be withdrawn or if there is any dispute between us as to the construction to be given to petitioner's argument below, that a copy of the transcript of that argument be filed as a part of the record in this case. We quote the substance of several statements from this transcript:

(Page 11.)

"Judge Major: Did I understand you to say that the item was either 'dividends' or 'commissions'?"

"Mr. Hall: That is right."

"Judge Major: It might be some of each mightn't it?"

"Mr. Hall: No, sir. If your Honor please. * * *

"Judge Major: Does it follow from what you said that the proof shows that no services were rendered?"

"Mr. Hall: I don't say that and I say now that it does not make any difference * * *"

(Page 12.)

"Judge Major: You do not agree with what Judge Lindley says do you that the record shows that all these defendants rendered services?"

"Mr. Hall: No, I do not agree with that."

"Judge Major: Mr. Hall, assuming * * * I suppose you won't agree to this but assume the record shows that the defendants rendered services to the corporation; if we assume that, would there be some kind of a presumption that at least part of the moneys they received were in payment for these services?"

"Mr. Hall: None whatever."

(Pages 38, 39.)

"Judge Major: Well if you had a civil case based on exactly the same facts as you have got here * * *"

"Mr. Hall: In a civil case based on these facts the decision would have to be they were liable for taxes on all of these dividends that were charged as commissions; that none of them were deductible * * *"

"Judge Major: On all or none."

"Mr. Hall: Oh, yes, sure."

that all defendants rendered services. (Appendix I "All defendants performed services for these commissions." *Infra*, pp. 50-53.) Petitioner, however, in its brief states that little or no services were performed by certain of the defendants (Brief 12 and 19). Petitioner then argues throughout its brief that the jury's verdict was warranted even though some of the defendants may have rendered services (Brief 19); that the fraud was no less because some of the stockholders may have rendered services (Brief 32) and that it was not bound to prove that none of the defendants performed services (Brief 33) and follows this argument with the statement "*it was entirely proper for the jury to determine that at least part of the distributions were dividends*" (Brief 33). This is in effect an argument that the record contained evidence from which the jury could infer that part of the commissions paid were dividends and part compensation for services. This is just the contrary to petitioner's theory of the case before the trial judge and its theory and admission in the court below.

This same argument and shift of position is used by petitioner in an attempt to justify the erroneous instruction. Petitioner states: "The preceding discussion discloses also the absence of any tenable basis for the suggestion of the court below that the criticized portion of the charge to the jury was neither consistent with the indictment nor the theory upon which the case was tried (R. 503)." (Brief 33.)

This attempted shift of position by petitioner at this late date is of itself conclusive that petitioner's evidence taken as a whole was insufficient to justify the verdict of the jury based on its theory that these deductions were dividends in their entirety and that the instruction complained of was erroneous.

The court then stated that it agreed with the Government's argument that there could be no middle ground.

First, because petitioner alleged that none of the defendants "rendered any services to the company" and, second, that it was a serious question whether a prosecution for income tax evasion founded upon an improper deduction can succeed where the proof is other than that the deduction is improper in its entirety (R. 502).

Petitioner takes issue with the first conclusion of the court by claiming that its indictment did not so allege. (Brief, 15, 31, 33.) This questionable contention is made here for the first time to avoid the fact that its evidence established that all defendants rendered services. (*Supra*, p. 7, footnote 4.) Petitioner in its petition for certiorari specifically stated that Count 5 of the indictment alleges that "none of the defendants performed any services for Consensus." (Pet. page 15 footnote 9.)

Petitioner's entire criticism of the opinion of the court below is directed to its second conclusion, especially the italicized portion of the following statement:

"We have reached the conclusion that where a statute permits a reasonable deduction for services, a criminal prosecution cannot be maintained by proof other than that such services were not rendered. It is not sufficient to allege or prove that a deduction claimed for services is unlawful because the amounts charged are unreasonable." (R. 502.)

Petitioner goes so far as to quote the italicized portion of this statement and then states that the judgment below was reversed upon that ground. (Brief 21) This statement is unfair in the light of the thorough examination made by the court below of the issues presented. If this had been the basis of the court's decision the case would have been reversed without remanding.

The italicized portion of this statement is clearly applicable to the facts in this case as analyzed by the court. As an abstract proposition of law standing alone, it may be too broad. It must be considered in connection with

the other language of the court. When so considered, it is obvious that all the court below held was that a criminal case could not be based only on the theory that a deduction was unreasonable. In support of its conclusion, the court relied upon the case of *U. S. v. Cohen Grocery Co.*, 255 U. S. 81. The decisions of this court, cited by the lower court, do raise a serious question whether a criminal action can be based on the theory only that a particular deduction for salary was unreasonable. It may well be as petitioner argues that in the light of Section 145-b of the Revenue Act and the decision of this court in the case of *Omacchevarria v. Idaho*, 246 U. S. 343-348, and others cited by petitioner that such a prosecution is possible (Brief, 24-30). This question may be of interest to petitioner in the future enforcement of its tax laws—and this court may well pass on this dispute between petitioner and the court below as to the correct rules of law applicable.

This question, however, is moot here in that petitioner's case was not tried in the trial court or presented to the court below on any such theory. Petitioner offered no evidence that the sums paid were unreasonable in relation to the services rendered. In so far as this case is concerned, the statement is mere dicta and was not the basis of the ultimate decision of the court.

Petitioner asserts that the gist of the offense charged under section 145(b) was the wilful attempt "in any manner to evade or defeat any tax" (Brief 22). The court below repeatedly recognized this fact and has so held in numerous opinions cited by petitioner in its brief. Petitioner also asserts that it was not required to prove evasion of the entire amount charged (Brief 22). The court below has recognized this principle several times in cases cited by petitioner. This latter principle of law has no application here, in that there was never any dispute as to

the *amount* of tax involved. This case related only to the *character* of a certain deduction, whether that deduction was proper or improper in its entirety.

Under the issues presented in this case as a basis for the claimed evasion or conspiracy to evade taxes, petitioner alleged and had to prove that the deductions of the item, commissions, in the income tax returns of the company were improper. *While the legal issue in this case was whether defendant conspired or attempted to evade the taxes of Consensus in whole or in part in any manner, the factual issue under the indictment and the record was whether or not these deductions were proper in whole or part.* Petitioner's theory was that these deductions were improper in that they constituted dividends. Petitioner's record was such in the trial court that this question was submitted to the jury on one theory only, that is, whether the deductions taken as a whole constituted dividends as such or constituted compensation for services. In an attempt to sustain the judgment of the trial court, petitioner, in the court below, admitted that these deductions were either proper or improper in their entirety, that there was no middle ground and claimed that the question of services and their reasonable value was immaterial. The court below reviewed the evidence, giving petitioner the full benefit of all inferences to which it was entitled, and correctly concluded that petitioner failed to prove that these deductions were improper. Petitioner's evidence did not even come close to proving this ultimate fact.

Using this italicized statement of the court as an abstract proposition petitioner intimates that the court in effect held that a prosecution could not be based on an unlawful deduction as long as it was *claimed* to be reasonable under Section 23(a) of the Revenue Act (Brief, 28). This intimation is particularly unfair to the court below and re-

spondents. Both in the trial court and the Circuit Court of Appeals, respondents recognized and conceded that a prosecution could be based on an unlawful deduction under this section, but claimed that the government had the burden to show, not merely that the deduction was unreasonable, but that it was so unreasonable in relation to the value of the services rendered as to constitute a fraud. (See Kruse's motion for new trial, R. 253, paragraph 8; also *supra*, p. 17, footnote 8.)

Not content with this criticism, petitioner goes even further and indicates that the court in effect held that there could be no criminal prosecution for an unlawful deduction (Brief, 28-30). The court specifically recognized that there could be (R. 502, 503). Petitioner indicates that the court's opinion in this case is contrary to its own decisions and those of other circuits holding that a criminal prosecution could be based on an unlawful deduction. (Brief 28, footnote 14.) It is sufficient here to say that in those cases the deductions in question were fictitious.¹⁰

Petitioner criticises the court below for stating that a fact unfavorable to the government was that this deduction was plainly disclosed in the books of the company and on its income tax returns, which were audited by the government (R. 501), and indicates that this conclusion had no factual support (page 9, footnote 5). Petitioner's contention is answered in Appendix I under the heading, "The Audits of the Income Tax Returns of Consensus by Revenue Agents", *infra*, pp. 55-57, where all the facts on this subject are set forth in detail.

Petitioner criticises the court below for failing to see the relevancy of the destruction of certain stock records and the execution and predating of certain contracts of employment (Brief 11). The only witness who testified concerning this subject was one Herbert S.

10. These cases were discussed in our answer in opposition to the petition for certiorari, pages 16 and 17.

Kamin, a lawyer, relative of Annenberg's wife, and one of the original defendants herein. As pointed out by the Circuit Court of Appeals these acts were largely the acts of Kamin (R. 501). To determine their significance as evidence in this case it is necessary to consider Kamin's testimony as a whole. See Appendix I, *infra*, pp. 40-49, particularly pp. 48-49. Petitioner's statement of these facts as they appear on pages 10 and 11 of its brief are unjustified, distorted and wholly unwarranted from the facts testified to by Kamin, its own witness.

If there was any error in the principles of law announced by the court below, it was only in its statement that it was not sufficient "to allege or prove that a deduction claimed for services is unlawful because the amount charged is unreasonable." This statement and similar statements must be considered in connection with the facts then before the court. It is pure dicta as far as this case is concerned. Petitioner never advanced such claim or offered proof on this theory.

Petitioner's entire brief is built about this one statement of the court, which standing alone, out of the context of the facts in this case, may be too broad. Seizing upon this statement petitioner argues that it was erroneous and contrary to other decisions of this court (Brief 24-30); that the entire decision of the court below was based thereon (Brief 21 and 24); that the court below set up some new standard of guilt and read an unwarranted limitation into Sec. 145(b) of the Revenue Act (Brief 28). It is perfectly apparent from our analysis of the facts, and from the court's opinion that this statement was not the basis of the court's ultimate decision—it could not be under the record. Petitioner having concluded that a criminal case may be based on an unreasonable deduction for salaries then misrepresents to the court that this is such a case (Brief 33). Petitioner first adroitly argues

throughout its brief that the fraud was no less complete because *some* of the defendants rendered services (Brief 19, 32, and 33); then petitioner misstates the record by stating that its evidence established that only certain of the defendants rendered services and the others rendered *no* services (Brief 12, and 19) and then repudiates its position before the trial court and the court below (Brief 32-33). Petitioner thus reaches its ultimate goal and states "*it was entirely proper for the jury to determine that at least part of the distributions were dividends.*" (Brief 33.) Such a shift of position is not only unfair to the court below but likewise to respondents.

The ultimate conclusion of the court below is correct. This is especially so in view of the indictment, the evidence and petitioner's shift of positions. Petitioner's criticisms of the court's opinion are wholly without justification.

Conclusion.

The facts disclose a large deduction taken by a corporation over a period of years in the same identical manner. Petitioner in the face of a full disclosure and after the civil liability has been barred by the Statute of Limitations, in the absence of fraud, seeks to turn the facts into a criminal case. The law applicable to a deduction by a corporation for salaries or commissions paid is simply and clearly defined not only in the treasury regulations but in the decisions of the courts. In substance, it is whether or not the sums paid as compensation were reasonable in relation to the services rendered. This simple question is present in this case. Petitioner failed to prove that the payments made defendants in this case were improper on the theory that defendants had rendered no services, and offered no evidence to show that the payments made were excessive or unreasonable in relation to the services rendered. Petitioner did not even establish a civil case, much less a criminal case.

The real question involved in this appeal is whether the government in the trial established a *prima facie* case. If not, the trial judge erred in not granting defendants' motions for directed verdicts. The government had the burden of offering substantial evidence to prove that the deductions taken by Consensus for compensation paid defendants was excessive. This the government did not do. In addition thereto the trial court erroneously instructed the jury that they could find the defendants guilty if they found only that a part of these commissions were dividends. Not only was this instruction diametrically opposed to the theory on which petitioner's case was presented, but was without factual support. Faced with this situation, the Circuit Court of Appeals reversed and remanded the case.

The decision of the Circuit Court of Appeals is not based on the legal question that an income tax indictment may not be founded merely on an excessive deduction. Otherwise, the Circuit Court of Appeals would have reversed and not remanded the case. Whether that question is good law may be of interest to the court but it is moot in this case.

Defendants respectfully submit that the government in the trial of this cause did not prove civil tax liability of Consensus, let alone the guilt of defendants for attempting to evade that liability.

Respectfully submitted,

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 and Lester A. Kruse, De-
 fendants-Respondents.*

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APPENDIX I.

AN ANALYSIS OF THE FACTS.

I.

Organization, Operation and Books of Consensus.

One Sweig in 1927 at St. Louis brought into being a card known as a "rundown sheet" to be sold to book-makers. Later he took Molasky in as a partner and on September 9, 1929, sold his interest in the business to Molasky (Govt. Ex. 63, R. 318, 319).

M. L. Annenberg at this time was the owner and head of various corporations, some of which were engaged in various phases of the racing business. The principal holding company of Annenberg's interests was the Cecelia Company. Kruse, Ragen and Molasky were employees and business associates of Annenberg in some of these ventures.

Howard Clark, called as a court's witness, on motion of petitioner, testified that in 1929 he was employed under Mr. Kruse as a bookkeeper; that the office force consisted of Kruse, Matheis, Clark and a stenographer; that approximately ten days before Consensus was organized Kruse and Molasky were in the office; that a short time later Annenberg came in; that they were talking between themselves; that he was attracted to their conversation when Annenberg called Ragen on the phone and said, "Jim, do you want to make some money?" (R. 422); that Ragen came over immediately and he, Clark, overheard part of the conversation between Annenberg, Kruse,

Molasky and Ragen, and Annenberg said that they were going to start a run-down business in St. Louis; he owned the business and was entitled to 30%; Molasky was to do the work in St. Louis and was entitled to 30%; A. W. Kruse and Ragen, Sr., were to get 20% each (R. 416).¹¹

On September 18, 1929, Kruse organized an Illinois corporation known as the "Consensus Publishing Company" (Govt. Ex. 67). The three incorporators were Howard Clark, Molasky and Thomas Ryan, who, together with one Jules Taylor, subscribed for all of the stock, consisting of 100 shares, of the value of \$5,000, which stock was issued as follows: Howard Clark, 20 shares; Thomas Ryan, 20 shares; William Molasky, 30 shares; Jules Taylor, 30 shares. The Clark stock was delivered to Kruse and the Molasky stock to Molasky. Nothing was paid by any of these persons for said stock.¹²

The company had no appreciable assets at its inception. It took over and expanded the original Sweig business which had not been successful. A stock book and corporate minute book were ordered; the stock issued as heretofore outlined; but no corporate meetings were held or minutes kept.

The business was operated by Molasky in St. Louis, and Kruse and Ragen, (later with the assistance of their sons), in Chicago, and as time went on greatly expanded with the result of increasing profits; Molasky collected the sums due from the sales and paid all expenses of operation other than these commissions; Molasky prepared two weekly statements, one showing the amount of collec-

11. Petitioner refers to this evidence (Brief 8, footnote 4) and disposes of same by the novel contention that "the jury by its verdict rejected this testimony."

12. On October 1, 1929, Taylor's stock was reissued to the Cecelia Investment Company (Govt. Ex. 109, R. 436); on June 3, 1933, the Molasky stock (30 shares) was reissued, 15 shares to Molasky and 15 shares to B. Hoffman, his niece, (Govt. Ex. 107 and 108, R. 367); about April 9, 1935, Clark's stock was reissued to one Herbert S. Kamin, (Govt. Ex. 201, R. 379).

tions, which he had deposited in an account in a St. Louis bank to the credit of Consensus, the other an expense statement showing the expenses which he had incurred and paid; these statements were forwarded to the Chicago office; they were taken by various bookkeepers and transcribed on work sheets to determine the amount to be distributed, that from these work sheets the entries were made into the cash book, journal and general ledger. After reimbursing Molasky for the expenses paid by him the net profits of the business, were distributed weekly by checks payable as follows: 30% to Cecelia Investment Co., 30% to Molasky, 20% to A. W. Kruse, 20% to J. M. Ragen and a weekly report, taken from these work sheets and showing the details of these transactions, was furnished each week to the respective parties.

(For detailed description of the above, see testimony of George Matheis, R. 322 to 327.)

Shortly after the incorporation of the company in 1929, Clark, the first bookkeeper of Consensus, at Kruse's directions, opened a set of books for the company; charged the sums paid to Molasky, Ragen, and Kruse as commissions and the sums paid Cecelia as dividends (R. 411). The books opened were a cash book (Govt. Ex. CB 1-2), a journal (Govt. Ex. J-1), and a general ledger (Govt. Ex. L-1).¹⁵

This method of operation was followed continuously with these exceptions:

1. Subsequent to January 3, 1933, when the stock of Molasky was split, the commission checks were

15. Four bookkeepers, Clark (R. 410 to 424), Matheis (R. 321 to 339), Burris (R. 339 to 345), and Sandberg (R. 357 to 362), who worked on these books at various times from 1929 to 1940, testified in detail that they were kept under Kruse's supervision; that all receipts and disbursements of the company were duly and correctly entered therein; that the procedure heretofore outlined was uniformly followed from 1929 to 1940; that these books truly and correctly reflected every transaction of the company and that they were in no way altered or changed and were in the same condition as when they worked on them; that they were from time to time made available to government revenue agents; that the income tax returns of the company were made up from them and disclosed on their face every transaction reflected in the books.

made payable on a basis of 15% to B. F. Hoffman and 15% to Molasky.

2. On or about April 3, 1931, Ragen brought his son, James M. Ragen, Jr., into the business and the commission checks from that date were made payable to J. M. Ragen, Jr.

3. On or about August 5, 1932, Kruse brought his son, Lester Kruse, into the business and from that date the commission checks were made payable to Lester until January 6, 1937, when they were again made payable to Kruse.

II.

The Work Sheets and Weekly Reports of Consensus.

Petitioner refers to the fact that certain of these work sheets and weekly reports labeled the distributions to Kruse, *et al.*, as "dividends" as being evidence to support the jury's finding (Brief 19), and claims this fact is cogent evidence that the payments so made "were in fact dividends or distribution of profits and not commissions" (Brief 9).

Petitioner concedes that the bookkeeper who received the weekly statements from Molasky "constructed his own work sheets on which he computed the receipts, expenses, net profits and distribution of the profits" (R. 414), and that reports showing this information were sent to the recipients of the net profits each week (Brief, 8). The weekly reports so furnished were copied by a stenographer from the work sheets and were an exact copy of the work sheets (R. 337).

Clark, the first bookkeeper, testified that he prepared these work sheets of his own volition for his own use; that on those sheets he showed the moneys paid to Ragen, Kruse and Molasky as commissions and the moneys paid Cecelia as "dividends" under a separate heading entitled "dis-

bursements" and lumped them together as dividends; that his failure to add the word "commissions" to the work sheets was pure neglect on his part (R. 418).

Matheis, who succeeded Clark in 1933, testified that he continued this practice on the work sheet which Clark had used; that when he (Matheis) started a new work sheet in August, 1933, he showed under the heading "disbursements" the amounts paid Kruse, *et al.*, as "commissions" and the amount paid Cecelia as "dividends" to conform to the books as Clark had gone wrong on the work sheets; that nobody told him to make this correction (R. 337).

Sandberg, the bookkeeper of Consensus from September, 1936, when his attention was directed to the fact that certain of his work sheets and necessarily the weekly reports showed the sums paid to Kruse, *et al.*, as dividends (From June 5, 1937, through November 5, 1937) stated:

"The item showed on the work sheet is dividends and commissions; in some places it does not say commissions. That is an **error**, possibly an oversight in writing up the work sheets." (R. 361.)

Petitioner nowhere in its brief mentions that the bookkeepers who were responsible for the lumping of the two items together under one heading "dividends" all testified that this was the result of error or neglect on the part of themselves and nothing else.

III.

Herbert S. Kamin; His Status, Duties and Activities; the Destruction of the Original Stock Book and Certificates; The Issuance of All the Stock of Cecelia; the Preparation and Predating of the Corporate Minutes; the Preparation and Predating of the Employment Contracts; and Execution of the Income Tax Returns of Consensus.

Introduction.

Making no reference to Herbert S. Kamin and his activities in this connection, petitioner refers to these facts as evidence of an attempt or conspiracy to defeat and evade the taxes of Consensus (Brief 19).

Kamin was an attorney, a relative of Annenberg's wife and in 1933 came to Chicago to take charge of the various corporate records of about 75 of the Annenberg companies, including Consensus (R. 386), and continued to have charge of these records up to the time of the trial (R. 371). Kamin, together with Annenberg and Jules Taylor, was one of the original defendants in this case. These defendants were dismissed on July 22, 1940.¹⁴

Petitioner, having made much of the destruction of

14. As fully appears from the record herein as a result of an extended investigation into the affairs of M. I. Annenberg, his companies, his relatives (including his son, Walter) and his business associates, the June and July 1939 federal grand juries at Chicago returned many inter-related indictments (mostly income tax), including this one (Consensus), against Annenberg, his son, Walter, certain of his relatives, business associates and certain of the defendants herein. The principal indictment, No. 31762, charged an attempt and conspiracy to evade the income taxes of Cecelia. As a result of negotiations between counsel arrangements were made for Annenberg and one Joseph E. Hafner, the bookkeeper of Cecelia, to plead guilty to Count Five of indictment No. 31762, the consideration of which was to be the dismissal of many of the indictments returned and many of the defendants from other indictments. This "arrangement" was reduced to writing in the form of a stipulation (R. 226), which was suppressed until petitioner was ordered to produce same and it was impounded as a part of the record in this case (R. 225). Upon Annenberg and Hafner being sentenced on the Fifth Count of Case No. 31762, the government on July 22, 1940, performed its part of the "arrangement." This included the dismissal of Kamin, Annenberg and Taylor from the indictment in question (R. 227).

certain records and the predating of others, we propose to analyze Kamin's testimony in detail (he being the only witness who testified on this subject) and where references are made to the record, they refer to Kamin's testimony. This analysis will show an entirely different picture than petitioner's version of these facts on pages 10 and 11 in its brief. According to petitioner's version Kruse *instructed* an *employee* to do all these acts because he, Kruse, was concerned over a certain opinion of the Board of Tax Appeals to the effect that if payments were made to stockholders in the same proportions as their stock holdings these payments constituted dividends.¹⁵ The *employee* was Kamin. In many instances Kamin testified as to what Kruse told him, and that certain actions were taken after conversations with Kruse. The testimony as to what Kruse told him, unless contradicted and there is no contradiction in this case, is evidence of that fact and binding on petitioner.¹⁶

Kamin's Status, Duties and Activities.

Kamin worked for the Annenberg companies. He worked for them, including Annenberg. Mr. Annenberg owned them. He didn't work for Kruse. He worked under Kruse, who was his superior (R. 387). Kamin testified that when he said Kruse was his superior he would not have done anything unlawful because Kruse asked him to if Kruse did; that Kruse could tell him regarding certain duties but he couldn't tell him as a lawyer regarding the law and he didn't take those orders; that if he believed anything was illegal he would not take orders from Kruse or anybody else (R. 393); that when he took charge of

15. We have been unable to find such an opinion in any of the reported decisions of the Board or of any Court. Petitioner cites none.

16. In the recent case of *U. S. v. Young*, 97 Fed. (2d) 209, 117 A. L. R. 316, the court held that the government was bound by exculpatory statements shown in its evidence unless contradicted. This question is fully covered in the A. L. R. note.

the various corporate record books of the Annenberg companies, including Consensus, he found that no corporate minutes had been kept, that the stock of most of them were held in the name of dummies and the whole thing was pretty much of a mess; that it was his duty to straighten out these records, bring their minutes up to date and get the stock of these corporations held in the name of dummies into the one big Annenberg Company, Cecelia (R. 371); that it was his duty to see that all these little corporations, whatever they were, had their minutes prepared and brought up to date and where stock was in the name of dummies arrangements were made so that the stock would reach Cecelia (R. 385, 386).

Kamin's actions in connection with Consensus were no different from his actions in connection with the books and records of other Annenberg companies. Prior to the time he took charge of the Consensus books he had straightened out other Annenberg corporations where he had procured stock certificates outstanding in the names of dummies, issued them to Cecelia and had written up minutes (R. 386). He drew new stock certificates and dated them back in other corporations and tore the old ones up. He predated minutes of maybe fifty of these corporations (R. 396, 397). The entire object and purpose of his acts in relation to Consensus are reflected in his testimony:

"The purpose of those stock certificates and my work in connection with the Consensus Publishing Company was to show ownership of all of the stock in Cecelia Company. I found that the stock of the Consensus Publishing Company had been issued in the names of various dummies, that Mr. Kruse had possession of one of those certificates, Mr. Molasky of one, and Mr. Raven of one. I was to get those stock certificates." (R. 387.)

Kamin did not start work on the books and records of Consensus until the summer of 1934 (R. 390). Kamin's testimony on the destruction preparation and predating of these documents follows:

1. THE STOCK OWNERSHIP OF CONSENSUS, THE ISSUANCE OF NEW STOCK, AND THE DESTRUCTION OF THE OLD STOCK BOOK

In the summer of 1934, Kamin first discussed with Kruse the situation as to Consensus. In referring to its stock, Kruse told him that a meeting was held at which Annenberg, Molasky, Ragen and Kruse were present and there was an agreement that Cecelia was to own its entire stock; that there was an oral agreement made that Molasky was to get 30% of the profits, Ragen 20% and Kruse 20% as commissions for services rendered and to be rendered (R. 392); that the reason Cecelia took over that business was because Molasky was losing money and Ragen, as head of the General News Service, and Kruse as head of the Racing Form could get business from their customers (R. 392). Kruse advised him that Cecelia should have owned all the stock of Consensus from the beginning; that the stock was issued incorrectly and that there had been some transfers of that stock and therefore the persons who held the stock were not the real owners; that Cecelia owned all the stock and therefore he wanted the stock book to reflect the true ownership (R. 374, 375). Kamin suggested to Kruse that in making the stock book reflect Cecelia's ownership, the outstanding shares should be transferred in the stock book but Kruse was of the opinion that it would raise a lot of unnecessary questions and that in view of the fact that there were no interests of third parties involved that he, Kruse, did not see why they should not make a new book and reflect the ownership correctly from the beginning; Kruse said that these people were drawing commissions from the company since its inception in the percentages of 20, 20 and 30; that they were paid as commissions and they had agreed to pay them as commissions from the beginning and the fact that the stock was issued in those proportions might tend to show that they were not commissions and therefore the stock

should be issued correctly to show Cecelia as the owner of all the stock (R. 375, 376). Kamin advised Kruse that he thought it was an irregular procedure to destroy an old book instead of making the transfers in the old book but Kruse wanted it done that way and Kamin did not see anything particularly wrong in it (R. 379). Kamin testified:

"My purpose in destroying the first stock certificate book was because in my opinion it had no further validity. The new stock having been issued, the Cecelia Company would have it, and it should be destroyed." (R. 388.)

In connection with the destruction of the stock book, Kamin did not have in mind or discuss any questions relating to income tax of the United States (R. 388).

Kamin, on or about August 27, 1934, prepared five new stock certificates of the corporation from blanks in his desk and predated them to September 18, 1929. The first four were made out in the names of the original subscribers for the amount of shares originally subscribed by them, and the fifth certificate, No. 5, to The Cecelia Company for 100 shares. These were sent to Molasky at St. Louis on August 27, 1934, accompanied by the following letter (Govt. Ex. 200, R. 377):

"DEAR BILL:

"Kindly sign the enclosed stock Certificates on the Consensus Publishing Company as president and also endorse your own certificate on the assignment on the back thereof.

"Please mail these certificates back to me immediately.

"Very truly yours,

HERBERT KAMIN."

These certificates were signed by Molasky, the one issued to him endorsed, and returned; Clark endorsed his and it was cancelled, together with those issued to Taylor,

Molasky and Ryan. The original thirty share certificate issued to Cecelia was turned back. The new certificate #5, issued to Cecelia for 100 shares of stock of the Consensus Company (the entire stock) was then delivered to Annenberg, who put it in the Cecelia vaults at the First National Bank where it has since remained; all of which took place on or about August 27, 1934 (R. 377, 378). The old stock book remained in existence for about a year when it was destroyed (R. 380).

At the time of the original conversation with Kruse, Kamin told Kruse that the outstanding original certificates of stock should be called in and cancelled and in view of the fact that they were going to destroy the stock book, these certificates would be cancelled by destruction. Kruse was perfectly agreeable to surrender his, but it turned out later that Molasky refused to return his stock certificates and no one returned theirs because Kamin felt it was unfair for the others to turn theirs in. Kamin asked Molasky to turn his in several times, and Molasky said that he wanted to have something that would guarantee him more than just a year's employment contract; that he (Molasky) wanted something tangible to show, in the event of his death, that he would be entitled to something from the company (R. 378, 379). These original stock certificates remained outstanding until 1938. In 1938 a ten-year employment contract was made with Molasky, Kruse and Ragen, Jr., all guaranteed by Cecelia. At that time these outstanding certificates were destroyed (R. 384).¹⁷

17. For the details of this destruction see petitioner's brief (page 11, footnote 7). The ludicrous sequel of these acts was that it availed them nothing. Molasky before he surrendered his certificate and that of R. Hoffman to Kamin in 1938 had them photostated (R. 366). He and his attorney later turned them over to the government prosecutor (R. 435) who used them against Molasky and the other defendants in this case (Govt. Exs. 107, 108).

2. THE WRITING UP AND PREDATING OF THE CORPORATE MINUTES.

When Kamin took charge of the Consensus corporate minute book (Govt. Ex. 59) it was no different from the minute books of many other of the Annenberg companies in that no record of any meetings appeared therein (R. 386). The Consensus minute book was never destroyed, doctored, altered or changed in any particular from the condition it was in when Kamin first saw it other than the minutes written up by him (R. 390). Subsequent to his first conversation with Kruse and about the time the new stock certificates were issued, Kamin prepared the minutes for the meetings from January 2, 1930, up to 1934, predated them, had them signed and from that time on kept the minutes of the corporation up to date (R. 384, 393).

3. THE PREPARATION OF THE EMPLOYMENT CONTRACTS.

Kruse talked to Kamin about drawing written employment contracts at or about the time the new stock was made (or it may have been later), advising him that the defendants had oral contracts with the company in which they were paid commissions; that, being oral, they might be hard to prove and, therefore, he thought they should have written contracts covering the entire period. So, they were drawn up (R. 381). Kamin did not recall whether he drew them up in 1934, 1935 or 1936.¹⁸ They were predated and provided for the payment to Kruse, his son, Ragen, his son, and Molasky of a percentage of the profits equivalent to the commissions paid them, and from then on yearly contracts were prepared (R. 381). Kamin stated:

"The employment contracts were prepared, written and dictated by me. I always knew of my own knowl-

18. Katherine Keeler, a handwriting and typewriting expert, expressed opinions from which it could be inferred that certain of these contracts were first signed in 1936.

edge that Molasky, Kruse and Ragen were connected with the company and did work for the company" (R. 388).

These employment contracts were all introduced in evidence as Government Exhibits 75 to 97, inclusive.

4. THE SIGNING OF THE INCOME TAX RETURNS.

Kamin testified that in 1934 he had some discussion with Kruse about a case before the Board of Tax Appeals where commissions were given to a man that owned all the stock of the corporation, in which case the Board of Tax Appeals had held that where stockholders received a division of the profits in proportion to their stock holdings these payments were not a deductible expense (R. 393); that Kruse then told Kamin that he wanted what actually occurred reflected in a proper and legal manner (R. 393).

Kamin signed the income tax return of the company for the year 1935 (Govt. Ex. 7) as treasurer, and its 1936 return (Govt. Ex. 8) as secretary of the company, with full knowledge of the opinion of the Board of Tax Appeals, with full knowledge of the fact that certain of the original certificates of Consensus were outstanding and with full knowledge that these commissions had been paid to Ragen, Kruse and Molasky, and were taken as a deduction. When asked for an explanation of why he did so he stated that neither Ragen, Kruse, or Molasky were stockholders, that Cecelia owned all the stock of Consensus (R. 397).

Kamin's testimony taken as a whole is conclusive that from the inception of Consensus it was the intention of all parties that M. L. Annenberg through Cecelia was to be the owner of Consensus; that Kruse, Ragen and Molasky were to receive a percentage of the profits for services rendered and to be rendered; that up to 1934 the stock of practically all of Annenberg's companies, including

Consensus, was held by dummies; that in 1934 all of the stock of Consensus was reissued in the name of Cecelia as of September 18, 1929, and delivered to Annenberg where it has since remained; that at this time the persons who held this stock were requested to surrender the original stock certificates of Consensus held by them; that Kruse was at all times willing to do so; that Molasky procrastinated and did not do so until 1938, when he, Kruse and Ragen received ten-year employment contracts from Consensus guaranteed by Cecelia; that in 1938 the original stock certificates were destroyed; that no minutes of Consensus were kept from 1930 to 1934; that in 1934 Kamin wrote up all the minutes of Consensus to 1934 and from that time kept the minute book up to date, in no way tampering with them; that the employment contracts were prepared some time in 1934, 1935, or 1936, to cover the prior period and were all predated and signed at one time and employment contracts from year to year were executed thereafter.

Petitioner in support of its argument that the evidence was sufficient to go to the jury states:

"Defendants participated in the destruction of critical documents and in the execution of spurious predated contracts of employment." (Brief, 20.)

The destruction of certain of these documents and the execution and predating of others must necessarily be considered in connection with Kamin's entire testimony. His primary purpose in connection with Consensus as disclosed by his testimony was to get its records in shape to reflect the true condition of the company from its inception, to get the minutes brought up to date and get its stock then held by dummies into Cecelia, the main Annenberg company. That this was his purpose is corroborated by his own testimony that he had the same problem in respect to a number of other Annenberg companies and

did substantially the same thing. The predating of the corporate minutes and the execution of the employment contracts were but to reflect a condition which existed prior thereto. There is nothing in petitioner's evidence to show that the condition existed other than as testified to by Clark and other than as told by Kruse to both Kamin and Burris. Considering petitioner's evidence as a whole, we are of the opinion that its reference to the employment contracts as *spurious* is unjustified.

As to the destruction of the stock record, Kamin himself testified that while he thought it was irregular, he saw nothing particularly wrong with it (R. 379) and further testified that his purpose in destroying the stock record was because in his opinion it had no further validity, the stock having been issued, Cecelia would have it and it should be destroyed (R. 388). As to the destruction of the stock certificates and the method, it was the obvious intention of the parties that they should be *destroyed*. Kamin suggested it. (R. 378.)

Petitioner makes much of the destruction of these records. Just what probative value this evidence has in this case is doubtful. At the most, this may constitute a circumstance establishing that the defendants were stockholders to be considered with the other proof in this case with that caution and circumspection which its inconclusiveness standing alone requires. *Hickory v. U. S.*, 160 U. S. 408, 410. It is not proof of the fact that the defendants were stockholders; it certainly is not proof of the fact that there was an attempt and conspiracy to evade the taxes of Consensus.

IV.

All Defendants Performed Services for These Commissions.

Petitioner at last concedes that Molasky and Kruse, Sr. rendered services to Consensus (Brief 12) so this fact is no longer open to dispute.

Petitioner states, "But there is also evidence that little or no services were performed by the other respondents" (Brief 12), referring to Ragen, Ragen, Jr., and Lester Kruse. In support of this statement, petitioner refers to certain testimony of one Burris and one Brooks. Petitioner states that Burris testified that he had no knowledge of any work that Lester Kruse, Ragen, Sr. or Ragen, Jr. ever did for Consensus. Burris stated on cross-examination that he had no occasion to know what work they did (R. 344).

Petitioner refers to the fact that Brooks did not know these defendants (Brief 12). Brooks was an employee of Molasky in St. Louis and had supervision of the printing and distribution of the rundown sheets from St. Louis. He testified that most of his dealings with Consensus were by telephone and he talked to the various defendants in Chicago many times; that when he said he talked to Ragen, he meant Ragen and Ragen, Jr.; that when he said he talked to Kruse, he meant Kruse and Kruse's son; that if Ragen wasn't in, he would talk to Kruse; that if Kruse wasn't in, he would talk to Lester (R. 355). This evidence of Burris and Brooks is far from establishing that no services were rendered by Ragen, Sr., Ragen, Jr. and Lester.

In a further attempt to reflect upon the services rendered by all defendants, petitioner refers to Brooks as **an employee of another company owned by Molasky** and states:

"In answer to repeated questions by the court at the trial Brooks testified that there wasn't much supervis-

ing that had to be done but that he did all of it and no one else did any," (Brief 6)

a clear inference that Brooks ran the business and the defendants did practically nothing. Brooks on cross-examination testified:

"When I stated that I did practically all the supervising work I meant with reference to the printing of the sheets only. **The conduct of the rest of the business was all done by Molasky**" (R. 354).

Brooks was testifying as to the activities in St. Louis, which were handled by Molasky. This testimony here had no reference to the activities of the other defendants in Chicago. Brooks also testified as to some of the services of Molasky (R. 354).

The fact, that petitioner intended to use the quoted portion of Brooks' testimony as a basis for its ultimate conclusion that there was ample evidence to justify the jury's verdict, is reflected on page 19 of its brief. In arguing that the verdict of the jury was amply supported by the record, petitioner states (Brief 19):

"The fact that the essential operations of the company were simple and were carried on largely by **part-time employees** * * *—all these furnish overwhelming support for the jury's conclusion * * *."

What petitioner intends to convey to this court is that Brooks actually ran Consensus just as they so stated to the Circuit Court of Appeals in these words, "**Gordon Brooks, who actually ran the business.**"¹⁹

The record shows that Ragen, Sr., Ragen, Jr., and Lester

19. The following are some of the quotations from petitioner's brief filed in the Circuit Court of Appeals:

1. "Gordon Brooks, an employee of one of Molasky's companies in St. Louis was in charge of the business; it required very little supervision, perhaps an hour or two of work a day (R. 351, 352)." (Brief 12.)

2. "Brooks testified that he supervised all of the work in the company's business as Molasky's representative (R. 351, 352)." (Brief 47.)

3. "Brooks testified that there was not much supervision that had to be done but he did all of it and that no one else did any (R. 352)." (Brief 47.)

4. "**Gordon Brooks, who actually ran the business.**" (Brief 77.)

Kruse also performed services for the company and all defendants were paid these commissions for such services (R. 322, 351, 354, 355, 359, 387, 388, 391). Both the trial court and the Circuit Court of Appeals after reviewing the evidence, concluded that it disclosed that all defendants had in fact performed services for Consensus and were entitled to compensation therefor.²⁰ No compensation was paid to any of these defendants for such services other than these commissions.

Petitioner throughout its brief assumes that its evidence established that some of the defendants (Kruse and Molasky) only performed services, and the others rendered no services. We have heretofore shown that its claim that the other defendants rendered no services was based on a misconstruction of the testimony of Brook and Burris. On page 19 of its brief, petitioner states, "The verdict was fully warranted even though some of the defendants may have rendered some services." Later on the same page in detailing certain facts claimed to support the verdict of the jury, petitioner states, "The fact that at least some of the defendants rendered no services at all, or at best, only fragmentary services." This is a clear misstatement of petitioner's evidence. Its evidence established that all defendants performed services. Its evidence is not that certain defendants rendered *fragmentary* services, but its evidence is *fragmentary* as to the

20. The trial court said:

"In other words, once having shown,—and this evidence does show,—that they rendered,—some of them at least, and perhaps all of them, perhaps all of them,—that they rendered some services: Now having shown they received some services and that they received these things as commissions, haven't you got to go further and show, in order to create a fraudulent intent that these commissions received were all out of proportion to the services rendered?" (R. 463.)

The U. S. Circuit Court of Appeals said:

"We think there is considerable testimony in the record of services rendered by Molasky, who was president of Consensus, as well as by Kruse, Sr., and some evidence of services performed by the other defendants." (R. 506.)

"The proof shows without doubt that they rendered services to Consensus and were entitled to compensation in the form of salary or otherwise." (R. 503.)

extent of the services rendered by all of the defendants. Petitioner's evidence established that all defendants rendered services and were paid these commissions for such services.

The Circuit Court of Appeals stated:

"It does not require a great deal of proof to be convincing that the executives, managers, and employees of a corporation which earned a gross income of \$119,960.96 for the year 1933 (in some years the income was much greater) rendered services and were reasonably entitled to substantial salaries. In 1929, Consensus took over a business—if it can be thus dignified—that was a losing proposition, and made it a financial success. So far as is disclosed by this record, these defendants alone were responsible for that success. According to the Government's theory, no executive ability was displayed and no service rendered for which the defendants were entitled to compensation or salary. Such a theory is incredible." (R. 500.)

V.

The Amount of Taxes Claimed To Be Evaded.

James W. Hyland, an agent for the Bureau of Internal Revenue, testified concerning various analyses made by him of the documents in evidence to show that Consensus owed the government additional taxes for the years in question.

The figures given by him as to gross income and expenses were identical to those in the Consensus books, the income tax returns and the indictment. By way of hypothetical question, including all figures on the books and in the income tax returns but completely ignoring the commissions paid as a deduction, he detailed over the objection of defendants his conclusions that the company owed the government additional taxes in the exact amounts claimed in the indictment. In other words, completely eliminating these commissions as an expense deduction and allowing

defendant corporation nothing as a deduction for the sums paid Molasky, Ragen, Ragen, Jr., Kruse, and Kruse, Jr., as commission, for services, Hayland arrived at the figures in the indictment, as to the amount of taxes alleged to be due. He testified:

"In arriving at the tax due from this company I assumed that Ragen and his son, Molasky, Kruse and his son were not entitled to one penny of commissions" (R. 429).

Hyland further testified that he examined the bank accounts and the personal checks of the various defendants (other than those of the Ragens) to determine what disposition was made of the sums received by them as commissions (R. 439). A summary of his testimony follows:

1. The proceeds of the checks to Molasky and B. Hoffman were used by Molasky.
2. The proceeds of the checks to Kruse, Ragen and Ragen, Jr., were used by these respective parties.
3. The checks issued to Lester Kruse were deposited either in a savings account entitled "A. W. Kruse Special" 973655 for the benefit of Lester against which account A. W. Kruse had a right to draw funds or in Lester Kruse's account at the First National Bank, against which both he and his father could draw checks.²¹

21. Petitioner infers that Kruse withdrew Lester's funds for his own benefit (Brief 7 footnote). The record indicates that insofar as the special savings account #973655 is concerned it was intact at the time of the trial, no part having been withdrawn. As to the other account, Kruse had authority to draw on this account and did draw on same but there is no evidence that any of these moneys were used for Kruse's own benefit. The record indicates that the moneys received by Lester were at all times segregated from those of Kruse. Burris testified that at Kruse's direction he segregated the moneys payable to Lester as against Kruse's funds, that he kept a personal cash book for both Kruse and Lester (R. 341).

At the time of the Annenberg investigation Kruse voluntarily delivered to Petitioner all the personal checks of Lester and himself (R. 365). Petitioner offered no proof that any of Lester's funds were used by Kruse for his own benefit.

VI.

The Audits of the Income Tax Returns of Consensus by Revenue Agents.

Each of the income tax returns of Consensus showed on their face the deduction of these commissions as an expense—the fact that 70% of the profits of Consensus were taken as a deduction.²²

Corporate returns are checked for apparent errors on the face when originally filed, then sent to the Commissioner at Washington; a preliminary audit is then made, and in certain instances the Commissioner determines to go back of the figures and make an audit of the return which is accomplished by returning it to the agent in Chicago who makes a field audit (R. 317); that the income tax returns of Consensus for the years 1931 and 1932 were so audited and additional taxes in small amounts assessed (these additional assessments related to matters other than the commissions) (R. 316). The returns on their face show these audits.

Mr. Hyland, of the Chicago Revenue Office, testified that an audit involved a detailed examination of the books and records of a company by the field agents; that the purpose of an audit was to ascertain whether the amount reported on the tax return was properly reflected on the corporate records and whether the deductions therefrom are proper and in accordance with the revenue law; that they take each item of deductions as shown in the return, see that it is properly reflected by the records and then

22. Burris testified he had examined several hundred income tax returns; that he had never before seen a deduction as a business expense, of this character and magnitude; that when he noticed it in this case he immediately asked Kruse as to the reason of this kind of a deduction (R. 343). The government objected to both Burris (R. 344) and Hyland (R. 439) testifying that the most casual examination of these income tax returns of Consensus by anyone having experience in income tax returns would call for inquiry under what circumstances these commissions were paid.

ascertain whether it is a proper deduction under the Revenue Act (R. 437); that in 1936 he Hyland made such an audit of Consensus for the years 1933 and 1934. Hyland detailed exactly what he did (R. 425).

Government Revenue Agents were continuously from at least 1933 up to 1939 in the office of Cecelia examining either its books or the books of other Annenberg companies. As far as Consensus was concerned they were given any records or information desired by them (R. 318, 338, 361, 362, 398, 424, 437).

Petitioner on page 9 of its brief (Footnote 5) states:

"The court below apparently attached some significance to the fact that the tax returns disclosed the deductions in question (R. 501). * * * Again, the opinion states as a fact that the returns had been audited, implying that the Government had knowledge of the facts. This receives no support in the record, * * *. Further, such an examination, even if made, would not be binding on the Government."

If petitioner intends to imply that the record does not support the fact that audits were made, we refer this court to the testimony heretofore discussed. As to the government's knowledge, we say that the income tax returns were of such a nature that by the exercise of the most casual observation or care petitioner was put on inquiry; that petitioner at all times had knowledge of these deductions as reflected from the character of the income tax returns; the audits made; and the method of handling income tax returns.

We concede that these audits would not be binding on the government. That is not the question. The fact is that the government from practically 1929 on had full knowledge, or by the exercise of the most ordinary care, could have acquired knowledge of the facts and circumstances under which these commissions were paid and the deductions were taken. Is it any wonder that the court below under these circumstances attached some significance

favorable to defendant from the fact that the tax returns disclosed there deductions; that they were audited from time to time by revenue agents; that no objection was made to the deductions in question; and that Revenue Agents at least from 1933 on had full access to the books and records of Consensus and were given such information as they desired:

VII.

Defendants Not Only Received All These Commissions for Their Own Benefit But Paid Income Taxes on Same.

All of the defendants reported in their individual income tax returns, received in evidence, the sums paid them as commissions, treated them as a payment for services rendered and paid both normal and surtax on same with the exception of Molasky and B. Hoffman who in their 1933, 1934 and 1935 returns reported them as "dividends." Molasky prior to 1933 had also returned these sums as compensation for services and paid full taxes thereon. The government in the spring of 1936 audited the income tax return of B. Hoffman for the year 1934 (Govt. Ex. 57) and assessed an additional tax of \$458.78 against her in effect recognizing that the payments she received from Consensus were not in fact dividends but commissions and salaries and subject to the normal tax. A copy of the audit made is attached to the income tax return.²³ Subsequent thereto Molasky and B. Hoffman likewise reported the amounts paid them from Consensus as salaries or commissions and not dividends, and paid taxes thereon.

23. Upon B. Hoffman procuring a letter from Consensus, attached to the audit, to the effect that these were commissions, the Government was content to rest there. It meant more taxes.

APPENDIX II.

Petitioner's Evidence Was Insufficient To Justify a Finding That Defendants Were Stockholders of Consensus.

Petitioner regards this case as the ordinary one where a jury's verdict is conclusive as to disputed questions of fact between the testimony of Government and defenses witnesses. This is illustrated by its statement in reference to Clark's testimony, "In any event the jury by its verdict rejected this testimony." (Brief 8, Footnote 4.) The problem presented is not so simple, and the above rule of law has no application here.

The only evidence offered in this case was that of petitioner's witnesses. Having called these witnesses, it was bound by their testimony in the absence of contradiction or mistake. *Cartello v. U. S.*, 93 Fed. (2d) 412, C. C. A. 8. The facts as such are not seriously in dispute. There are, however, many inconsistent facts in petitioner's own evidence and numerous conflicting hypotheses and inferences which can be drawn from these facts. Petitioner concedes this fact but erroneously asserts that the jury resolved these inferences in petitioner's favor (Brief 18).²⁴

To illustrate, considering petitioner's evidence as a whole, there are certain facts from which it may be inferred that the defendants were stockholders; there are other facts from which it may be inferred that they were not stockholders. These were conflicting hypotheses or inferences which petitioner was bound to reconcile before it was

24. "This was a simple issue of fact, resolved by the jury's verdict. The majority opinion of Circuit Judge Major, however, contains an elaborate narration of the evidence (R. 497-502). It undertakes to cast a balance between the conflicting inferences, approving some of the Government's contentions (R. 498), and more of the respondents (R. 500-502)."

Note petitioner's claim of the effect of the jury verdict.

entitled to have its case submitted to a jury. Evidence which is consistent with two conflicting hypotheses tends to prove neither. *Gunning v. Cooley*, 281 U. S. 90, 94. Proof of circumstances which while consistent with guilt are not inconsistent with innocence, will not support a conviction. *Cox v. U. S.*, 96 Fed. (2d) 41, 43 (C. C. A. 8). In addition thereto the circumstances *proved must be consistent with each other*, consistent with the hypothesis that the accused is guilty and at the same time inconsistent with the hypothesis that he is innocent. *Reviera v. U. S.*, 57 Fed. (2d) 816, 822, C. C. A. 1.²⁵ The jury's verdict in this case adds nothing to petitioner's case on appeal. It is of the utmost importance that these principles of law be kept in mind in considering the sufficiency of petitioner's evidence to establish that any of these defendants were stockholders.

We do not contend that there is no evidence in this record from which a jury might infer that some of the defendants at some time were stockholders of Consensus. Petitioner in its brief has directed this court's attention to these facts.

These facts and the hypothesis of ownership, which may arise therefrom, must, however, be considered in connection with the other evidence in this case on the same subject. We refer this court to the testimony of Clark as to the original agreement, Appendix I, *supra*, p. 35; the fact that defendants paid nothing for this stock Kruse's representation to both Kamin and Burris concerning that arrangement; the clear distinction in the corporate books from their

25. The simplest case on this subject which we have been able to find is *Jackson v. State*, 12 Okla. Crim. 446, 158 Pac. 202. A was indicted for selling whiskey. The State used two witnesses, one of whom testified A sold him the whiskey; the other witness testified that they did not buy the whiskey from A but from B. A did not testify. His motion for a directed verdict was overruled, and the jury returned a verdict of guilty. On appeal the case was reversed. The court stated:

"The State cannot put on two witnesses and prove by one of them that there is a probability of defendant's guilt and another that he is innocent absolutely, and expect this court to uphold the judgment." The conflict that existed was in the State's own evidence.

Had the State put on one witness who testified that he purchased the whiskey from A and had A testified and denied the sale, the jury's verdict would have been conclusive against A.

inception of the sums paid Cecelia and the sums paid the others; and the general broad situation of all the Annenberg companies as described by Kamin, namely, that the stock of all of these companies, including Consensus, was held in the name of dummies. At this time, 1934, the corporate records were brought up to date, a new stock book and certificates issued with the ultimate effect that a new certificate for 100 shares of stock was issued by the company in favor of Cecelia, delivered to Annenberg and placed in the vaults of Ceceila. Every corporate record from then on was consistent only with the theory that Cecelia was the owner of Consensus. The only inconsistent fact was Molasky's procrastination about the surrender of his original certificate and possibly the circumstances under which they were destroyed in 1938. Kruse had been perfectly willing to surrender his in 1934. For details see analysis of Kamin's testimony, Appendix I, *supra*, pp. 40-49.

It is not so much a question of the possession of this stock but rather a question of the intention of the parties. Were the defendants who held possession of these stock certificates the bona fide holders thereof with full power to use that stock as they saw fit, including the power to dispose of it to strangers? A fair inference is that they could not have done so. What stranger would have purchased this stock without first obtaining the consent of Annenberg? Petitioner's evidence, with its many conflicts, as to whether defendants held this stock as owners or dummies for Annenberg, was insufficient to present to the jury the question whether or not Kruse, Ragen and Molasky were in fact stockholders of Consensus.²⁶

It is difficult to understand how petitioner in this case

26. The Circuit Court of Appeals concluded:

"In our judgment the record justifies the conclusion that they (Ragen, Kruse and Molasky) were such owners." (Rec. 499—parentheses ours.)

We do not agree with this conclusion. The Court of Appeals may well have been proceeding on the theory that petitioner was only required to establish that the record contained some evidence that defendants were stockholders.

can conscientiously urge that these defendants were stockholders. It must be assumed that petitioner in the light of the extensive investigation of the affairs of M. L. Annenberg (as fully disclosed from the record herein) was fully aware as to the actual facts of the entire Annenberg picture at the time of the return of this mass of indictments. The contents of these various inter-related indictments was a matter of judicial notice before the trial court. Petitioner in the Cecelia indictment No. 31762 in effect charged that Annenberg through Cecelia was the owner of Consensus from 1929 on.²⁷ The basic theory behind the indictment in the case at bar was that certain of these commissions were in fact dividends. But the theory was not that they were a distribution of dividends to these defendants but to the defendant M. L. Annenberg in that these defendants were turning back to him certain of the moneys which they received.²⁸ Petitioner was unable to substantiate this theory. (*Supra*, p. 57.)

27. "That said Cecelia Company owned all or large controlling amounts of the capital stock of the next hereinafter mentioned corporations, and the said Moses L. Annenberg, by virtue of his ownership of Cecelia Company as aforesaid, and also by virtue of direct and personal ownership of capital stock, was at all of the times herein mentioned the owner of, and in control of the said corporations, which said corporations, among other similarly owned and controlled, are named as follows, to wit: • • •

"Consensus Publishing Company of Illinois."

28. Annenberg was named as a defendant in this case. The indictment does not charge that these defendants were the owners of this stock but in effect charges that the defendants (including Annenberg) "would be and were the owners and holders of beneficial interests for themselves and others in said corporation."

Hyland testified that he examined the bank accounts and the personal checks of the defendants (other than the checks of Ragans) to determine what disposition was made of these payments charged as commissions. The obvious purpose of his checking the disposition of these commissions was an attempt to find evidence that the payment of these sums to defendants were at least in part fictitious in that a portion thereof was being turned back to Annenberg. If this were true, obviously such sums would constitute dividends to Annenberg. There was no evidence to this effect.

APPENDIX III.

Revenue Act of 1932, 47 Stat. 169:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; • • •

SEC. 145. PENALTIES.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. • • •

Revenue Act of 1934, 48 Stat. 680:

Section 23 (a) is identical with Section 23 (a) of the Revenue Act of 1932 above quoted. (U. S. C., Title 26, Sec. 23.)

Section 145 (b) is identical with Section 145 (b) of the Revenue Act of 1932 above quoted. (U. S. C., Title 26, Sec. 145.)

Revenue Act of 1936, 49 Stat. 1648:

Section 23 (a) is identical with Section 23 (a) of the Revenue Act of 1932 above quoted.

Section 145 (b) is identical with Section 145 (b) of the Revenue Act of 1932 above quoted.

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 126. *Compensation for personal services.*— Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services.
• • •

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

Article 23 (a)-6 is identical with Article 126 of Treasury Regulations 77 above quoted.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

Article 23 (a)-6 is identical with Article 126 of Treasury Regulations 77 above quoted.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

No. 54

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

JAMES M. RAGEN,
Respondent.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING ON BEHALF OF
RESPONDENT, JAMES M. RAGEN.

JOHN L. McFARLANE,
Attorney for Respondent.

MATTHIAS CONCANNON and
SIDNEY R. ZATZ,
Of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1941

No. 54.

THE UNITED STATES OF AMERICA,
Petitioner,
v.s.

JAMES M. RAGEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

Respondent, James M. Ragen, respectfully presents this, his petition for rehearing, in the above entitled cause, and in support of said petition, respectfully shows the following:

I.

There is insufficient evidence to connect James M. Ragen Sr. with any attempt or conspiracy to evade taxes.

In holding that Ragen, Sr. was connected with a scheme to evade income taxes of the Consensus Company for the

years 1933 to 1936 and a conspiracy to evade such taxes for the years 1929 to 1939, the court has overlooked the applicability of *United States v. Falcone*, 311 U. S. 305, to the facts of the case.

On this subject the court refers to the circumstance that from time to time until 1935, Ragen Sr. signed some "commission" checks (Opinion, p. 4) and in footnote 2 says that "because of this and other circumstances showing Ragen's continued participation in the affairs of Consensus," the argument that there was insufficient evidence to establish his connection with any scheme to evade taxes is without merit. It is submitted that the mere fact that Ragen signed some commission checks does not tend to prove that he was a party to any attempt or conspiracy to evade and defeat taxes. It was not the payment of these commissions which constituted the offense. The offense charged was the wilful attempt to evade taxes by taking deductions for these commission payments in Consensus' income tax returns or engaging in a conspiracy to do so. The evidence does not show that Ragen, Sr. had anything to do with the preparation, signing or filing of these returns, or that he ever knew the contents of any of them.

The only other evidence pertaining to Ragen Sr. is:

- (1) Ragen Sr. was present at the original meeting with Annenberg in 1929 when it was agreed he was to receive 20% of the earnings of the run-down sheet business (R. 416). Nothing was said at this meeting about income taxes or any tax deductions.
- (2) He received these sums until March 19, 1931 after which his son received a like amount and Ragen Sr. received nothing more (R. 426). After that date Ragen Sr. ceased to have any connection with the management of Consensus.
- (3) During the time Ragen Sr. received 20% of the earnings, he received copies of the bookkeepers'

work sheets listing the commissions paid him under dividends (R. 413).

- (4) Ragen performed services for the company until March 19, 1931. Brooks testified he talked to Ragen Sr. on the long distance telephone at various times regarding the business of the company (R. 354). Ragen saw to it that customers who had cut their orders for run down sheets reinstated them (R. 355). Ragen was head of the General News Service and had contacts enabling him to get run down business (R. 392). During the time Ragen Sr. was connected with Consensus its sales, limited in 1929 to 150 persons daily in St. Louis, (R. 321) were increased to \$135,000 in 1930 (R. 21) and its operations were extended to other cities as well as St. Louis (R. 354, 365).
- (5) Some time in 1934, 1935 or 1936, at the request of the company's attorney, he signed employment contracts for 1930 and 1931 and an assignment of the 1931 contract to his son (R. 381).

Ragen Sr. was never an officer or director of Consensus. He had nothing to do with its books or income tax returns (Ex. 1-9). He did not know the contents thereof, nor the deductions taken therein. None of the evidence shows that Ragen Sr. had anything to do with or any knowledge of the income tax affairs of the company. There is nothing to indicate that the Board of Tax Appeals' decision to which the court refers on page 3 of its opinion was ever discussed with James M. Ragen Sr., or that he knew anything about it. There is nothing to indicate that the basis upon which deductions were to be handled in the income tax returns of Consensus was ever discussed with Ragen Sr., or that he had any knowledge thereof.

The evidence discloses a business arrangement for the payment of a part of the earnings of Consensus to Ragen

and the carrying out of that arrangement. It had nothing to do with the company's tax liability. Ragen Sr. performed services under this arrangement and received the agreed compensation. There is nothing to indicate that Ragen knew there was any question of the deductibility of commissions involved, or even that the company was deducting commissions in its income tax returns. When he signed employment contracts for 1930 and 1931 and the assignment, he did so at the request of the company's attorney, and as far as he was concerned, the contracts merely evidenced his understanding of what had occurred. There is nothing to show that he knew that the contracts involved taxes in any way.

The court has ascribed to Ragen Sr. responsibility for the acts of all the defendants without any evidence to show that he knew of any conspiracy or became a party thereto. There was nothing to indicate to Ragen Sr. that any conspiracy existed to attempt to evade or defeat taxes. The holding of this court in *United States v. Falcone*, 311 U. S. 205, 210 that "these having no knowledge of the conspiracy are not conspirators", even though acts done by them may have furthered the object of the conspiracy is especially applicable here. Ragen Sr. had no knowledge of any conspiracy or any attempt to evade taxes. He had no knowledge of and no connection with the books or income tax affairs of the company. He therefore had no connection with the offenses charged.

It is fundamental law that in a criminal case, unless the evidence excludes every hypothesis except that of guilt, it is the duty of the court to direct a verdict for the defendant. *Nicola v. United States*, 72 F. (2d) 780, 786 (C.C.A. 3); *Dahly v. United States*, 50 F. (2d) 37, 43 (C.C.A. 8). The evidence as to Ragen Sr. was of such a character that a verdict should have been directed as to him.

II.

The evidence is insufficient to support a verdict that unreasonable payments were made for services rendered.

In support of its conclusion that there is evidence to support a verdict that unreasonable payments were made for services rendered to Consensus, the court states that its business "according to the testimony of a person who was in immediate charge of its major operations" (referring apparently to the testimony of Gordon Brooks) "normally required only an hour and a half daily of managerial supervision", and "would hardly seem to call for additional executive services worth what Consensus paid in 'commissions' " (Opinion, p. 7). Reference to the testimony of Gordon Brooks shows that Brooks himself testified that he was not in charge of the major operations of the company (R. 354). He was a clerk who worked for Molasky in St. Louis, his work being, as he himself testified, "keeping the record of receipts and expenses which constituted most of the work", the preparation of "the weekly reports that Molasky sent to the Chicago office showing the receipts and disbursements" and supervision of the printing of the run down card at St. Louis (R. 351). It was upon that clerical work that Brooks testified he spent an hour and a half daily and three hours the day he made up the reports¹ (R. 351). There was no testimony that the business of the company required only an hour and a half daily of managerial supervision.

Apparently, the court was misled by answers Brooks, who was called as a Government witness, gave to leading questions on direct examination as to whether he did all the supervisory work (R. 352). However, on cross exami-

¹ The summary of Brooks' work contained on page 2 of the opinion is in accord with this statement.

nation, Brooks made it clear that the only supervisory work he did was with reference to printing the run down sheet at St. Louis, that the conduct of the rest of the business at St. Louis was all done by Molasky, who gave all the instructions, and that Brooks had nothing to do with the printing of the sheet at Cincinnati (R. 354, 355). In the absence of Molasky who frequently travelled to various cities opening up accounts for the company and was absent a large part of the time, Brooks called Chicago for instructions, talking to Ragen Sr., Ragen Jr., A. W. Kruse and Lester Kruse (R. 354, 355).

Brooks' testimony does not purport to state anything concerning the major operations of the company or the services rendered by the defendants. The evidence is clear that Brooks, a clerk in Molasky's St. Louis office, had little, if anything, to do with the major operations of the company which were conducted away from the office where Brooks was located. He was not in a position where he could know much about them. The major operations of the company centered about the sale of run down sheets in Cincinnati, Dayton, Louisville, Lexington, East St. Louis and Kansas City, as well as in St. Louis (R. 354, 355, 365). The company maintained offices in Chicago, where Ragen Sr. and Jr. were located, separate from the accounting office in Chicago, and out of this office men worked, going out to call on customers and doing other business for Consensus (R. 392). Molasky was in charge of the operations at St. Louis and often travelled on business of the company to Columbus, Louisville, Dayton and Lexington (R. 355). Molasky, together with A. W. Kruse and Ragen Sr. (succeeded in 1931 by Ragen Jr.) were executives of the company and managed its operations (R. 385, 388, 392). Molasky often came to Chicago or phoned Chicago and consulted Kruse and Ragen on matters of the company's business (R. 385, 392). Ragen Sr. (subsequently succeeded by Ragen Jr. (R. 394)) was head of the Gen-

eral News Service, which furnished information to book-makers. A. W. Kruse was head of the Daily Racing Form, a racing publication (R. 392). By virtue of their position and contacts, these men were able to obtain run down business for Consensus (R. 392). That they did so is abundantly established by the fact that this business, unprofitable and selling to but 150 persons a day in St. Louis when they took it over in 1929, was extended under their management to Cincinnati, Lexington, East St. Louis, Dayton, Columbus, Kansas City and other places and attained sales reaching \$212,562.00 yearly (R. 426). Sales, not Brooks' clerical work, constituted the major operations of the company. And as to sales, the record is uncontradicted that they were handled by and were under the supervision of the defendants to the benefit of the company.

In view of Brooks' limited participation and contact with the major activities of Consensus, the circumstance referred to in the opinion (page 7) that Brooks spoke to Lester Kruse but twice on the telephone and had not seen some of the recipients of commissions, throws no light upon the services that were performed by the defendants or the value of the services. They could be doing a great deal of work upon sales for the company and still Brooks, whose contact with all the defendants, except Molasky, was only by long distance telephone calls, would seldom have occasion to see them. Since Brooks would talk to Lester Kruse only if Ragen Sr., Ragen Jr. and A. W. Kruse were all out (R. 355), the circumstance that Brooks had but two conversations with Lester Kruse affords no indication as to what Lester was doing. Brooks did talk to Lester about some trouble in Louisville, where some one else put out a competing run down sheet (R. 355).

The evidence shows that the defendants procured and maintained sales for the company. For such work as

they did, they were entitled to reasonable compensation. But upon the record in this case no one can say what that reasonable compensation is, whether more or less than the sums paid them, because there is no evidence as to the nature and extent of the work so shown to have been rendered, or whether it constituted all of the services performed by them, or what the reasonable value thereof was.

The circumstance referred to by the court that other salaries and wages were small² in comparison with commissions throws no light on the reasonable value of the services rendered by the defendants. In view of the large sales made by Consensus, if any inference at all is to be drawn from that circumstance, it is that the defendants themselves, rather than employees, procured the sales and did most of the other necessary work. Moreover further demonstrating that the salaries paid employees affords no criterion as to the work done by the defendants, the record shows several instances of services by employees rendered to Consensus which were charged to other enterprises conducted by the defendants. Brooks is such an instance (R. 352). The various bookkeepers and the company attorney, Kamin, are other instances (R. 321, 339, 352, 357, 371, 421).

The court calls attention to other circumstances which when taken together with Brooks' testimony, it considers as supporting a finding that unreasonable allowances were made for personal services (Opinion, page 8). Brooks' testimony, as we have shown, does not support such a finding. It is submitted that the other circumstances

² Page 8, footnote 6 of the opinion. Salaries and wages paid compared to commissions were not as small as the opinion of the court indicates. The year 1936 to which the court refers is not a typical year. Salaries and wages paid were much greater and commissions much lower in other years. (Ex. 1-8, Consensus Income Tax Returns.)

referred to—the uniformity of the distribution of 30% to Cecelia as dividends and 70% to the defendants as commissions, the payment of commissions in proportion to original stock holdings, and the destruction of the stock record and the writing of back dated employment contracts and stock certificates—as well fail to support a finding that unreasonable allowances were made for personal services. There is no necessary correlation between any of these circumstances and the reasonableness or unreasonableness of the compensation paid the defendants. All of these things could have happened and still the sums paid the defendants could be not in excess of reasonable compensation for the work done, depending on the services rendered. The only way in which the reasonableness of the compensation paid can be determined is by examining the nature, extent and value of the services rendered. Those matters alone are determinative as to the reasonableness of the compensation. Where, as in the instant case, the facts as to those matters are not established by the evidence, there is no basis upon which such a determination can be made.

The opinion of the court states “there was evidence, which if believed, tended to establish that each defendant had performed some service, though of an irregular and undefined nature” (Opinion, page 4). The evidence was all that of the Government, the defendants having offered none and it was uncontradicted. It was incumbent upon the Government to establish that the sums paid for the services were unreasonable. Yet there was no evidence that the services shown were all the services rendered by the defendants and there was no evidence as to the amount of work performed or the reasonable value of such work, although the evidence, fragmentary though it was, did show that Consensus had received the benefit of valuable executive and sales services for which no one else but the defendants could have been responsible. On this state

of the record, it is respectfully submitted there is no substantial evidence to support a finding that the sums deducted as "commissions" were more than reasonable compensation for services rendered. Such a conclusion would rest upon conjecture or suspicion rather than evidence. Therefore, the convictions were without warrant and the judgment of the Circuit Court of Appeals should be affirmed.

III.

This court has sustained the convictions upon an issue which the Government contended was not involved until it came into this court and upon which the defendants have had no opportunity to present any evidence.

This court has upheld the verdict of the jury upon the ground that there is evidence sufficient to support a finding by the jury that the respondents wilfully attempted to make unreasonable allowances for personal services. As pointed out in the brief filed on behalf of this respondent, this is a principle which the Government, both in the trial and in the Circuit Court of Appeals, contended was not involved in the case. Until it came into this court, the Government consistently took the position that no question of reasonableness of the compensation paid was involved. The defendants, relying upon the Government's position, introduced no evidence as to the services rendered or the reasonableness of the compensation paid, but rested at the close of the Government's case. To uphold the convictions upon this issue is tantamount to denying the defendants an opportunity to present evidence thereupon. Upon this point, to avoid repetition, Respondent James M. Ragen adopts the argument contained in the petition for rehearing filed on behalf of Arnold W. Kruse and Lester A. Kruse (Cases Numbered 55 and 56).

Respondent, James M. Ragen, Sr., therefore respectfully prays that a rehearing be granted and that on such rehearing, the judgment of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

.....
JOHN L. McINERNEY,
Attorney for Respondent,
James M. Ragen.

MATTHIAS CONCANNON,
SIDNEY R. ZATZ,
Of Counsel.

Certificate of Counsel.

I, John L. McInerney, do hereby certify that I am the attorney for James M. Ragen, respondent in the above entitled cause, and that the above and foregoing petition for rehearing is presented in good faith and not for delay.

.....
JOHN L. McINERNEY.

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JAN 24 1942

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. **55-56**

THE UNITED STATES OF AMERICA,
Petitioner,
vs.

ARNOLD W. KRUSE,
Respondent.

THE UNITED STATES OF AMERICA,
Petitioner,
vs.

LESTER A. KRUSE,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

GEORGE K. BOWDEN,
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and Lester A. Kruse, De-
fendants-Respondents.*

JOSEPH A. STUETT,
WARREN CANADAY,
Of Counsel.

IN THE
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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

The opinion of this Court, rendered January 5, 1942, clearly and succinctly outlined the facts of this case and laid down reasonable and understandable principles of law as applied to them. The legal contentions raised by our brief were fully recognized by this Court when it held that the dominant issue in this case was whether these payments were reasonable compensation. Our legal contentions were answered when this Court held as a matter

of law that the government's evidence was sufficient to establish a *prima facie* case that the commissions paid the defendants were unreasonable compensation. While we do not agree with this Court's conclusion as to the question of variance, the problem presented herein is far more prejudicial to the rights of the defendants than a mere matter of variance.

We sincerely and earnestly ask the Court's indulgence, to briefly review the proceedings in this case, to determine whether the disposition made by this Court in affirming the judgment of the District Court is fair in view of the proceedings in the courts below. We further ask that this Court will review those proceedings from the standpoint of the defendants' counsel, putting itself in their position, in determining whether the final disposition made by this Court is fair and in keeping with judicial impartiality.

As pointed out by this Court the gist of the offenses charged was a wilful attempt or conspiracy to evade taxes in any manner. This is a broad charge. The details of the manner and means of the alleged evasion, ordinarily, must be found in the indictment itself. The substantive counts allege the wilful attempt to evade taxes by a deduction of these commissions. There is no allegation anywhere in these counts as to why these deductions were improper.¹

The conspiracy count alleged that these deductions were dividends—a distribution of profits to the defendants as stockholders—and that the defendants rendered no services to the company. The indictment contains no allegation or suggestion that the commissions were unreasonable compensation for the defendants' services. Such was not the theory of the indictment, as will appear from the gov-

1. These counts do not allege that the defendants "under the guise of paying commissions . . . distributed dividends" as this court twice stated in its opinion and as repeatedly represented to this Court by the government in its brief. For correct analysis of indictment, see our brief, pp. 5-8.

ernment's brief before the Circuit Court of Appeals, where it is stated (page 13).

"Again, it must be emphasized that the indictment in the case at bar does not charge that the defendants wilfully attempted to evade and defeat taxes by taking deductions of unreasonable amounts as commission, that is, payment for services; rather it charges that the defendants wilfully attempted to evade and defeat taxes by claiming as deductions for commissions, amounts which were in fact distributed as dividends and were not intended as compensation for services."
(Ital. ours.)

The defendants rested their case without offering any evidence. Just prior to their doing so, in support of their motions for directed verdicts, they took the position that inasmuch as there was an allegation in the indictment that defendants rendered no services for these commissions, and the government's evidence having established that all of the defendants had rendered services, that it was therefore incumbent on the prosecution to at least prove that the deductions were unreasonable compensation for the services so rendered. This was a legal question involving the probative value of the government's evidence as a whole—the same question on which this Court, in its opinion, stated that the evidence was sufficient to go to the jury. What was the government's answer to this position taken by us in the trial court? *The government in effect conceded that its evidence was insufficient to show that these payments were unreasonable when it took the position that this question was not involved in this case.* The position the government took before the trial court was that their evidence as a whole established that these commissions were in their entirety a subterfuge for the distribution of dividends.

The first question Judge Lindley asked the government at the conclusion of our argument was whether or not its evidence showed that the defendants did not earn these

commissions. The government's answer was that that question was not involved in this case. We quote:

"The Court: Mr. Hall, let me ask you this question: Does the evidence show that the defendants did not earn any salaries?

"Mr. Hall: *That question is not involved, if the court please.*

"The Court: I wish you would set me right on it.

"Mr. Hall: *The question of what these defendants earned is not involved in this case.*

"The Court: Well, if they earned these commissions they were entitled to them.

"Mr. Hall: The evidence shows, if the court please, on the Government's theory, and it tends to prove it, that these commissions, the charge of commissions was used as a subterfuge to distribute the 70 per cent of the company's net income to the stockholders. Now, I don't care, it doesn't matter under the cases, if it was a subterfuge used for that purpose and there was no agreement for the payment of services or for services rendered to the corporation, whether they performed any services at all or not, if those were dividends they were dividends." (Rec. 459.) (Ital. ours.)

The record is clear and not subject to contradiction that the government position, before the trial court before we rested our case without offering any evidence, was as above outlined.

The record further is clear that the trial court at the time of the argument on the motions for directed verdicts was of the opinion that the government's evidence was insufficient to establish that these payments were unreasonable compensation;² that the trial court determined to submit this case to the jury alone on the broad question whether or not the payment of these commissions was but

2. We quote that Court:

"Now, having shown that they rendered some services and that they received these things as commissions, haven't you got to go further and show, in order to create a fraudulent intent, that these commissions received were all out of proportion to the services rendered?" (Rec. 463.)

a subterfuge for the distribution of dividends;³ that the court did so instruct the jury⁴ and that the government fully recognized that this was the theory upon which this case was submitted to the jury.⁵

3. The trial court then stated:

"There is one question in this case which after all, is an ultimate question of facts to be settled and adjudicated through the principles of law and that is whether the sums that were paid in this case to the individual defendants were the distribution of profits of the corporation and therefore not deductible in its income tax return.

"Well, whether they were in effect in good faith in the payment by the corporation for services rendered to the corporation and therefore deductible as ordinary and necessary expenses in the operation of its business under Section 146 of the Revenue Act, I think in that situation the government has certain evidence here which it should have the jury's verdict upon, and whatever my personal view may be, and I admit that I think this is a pretty weak case, I prefer to let " go to the jury and see what develops." (Rec. 465.)

4. This is borne out by further portions of the instructions, which are quoted below:

"So it is a vital question in this case of whether the Consensus Company was entitled to deduct from its income the sums distributed to the defendants as ordinary and necessary expenses of its business. The question is whether it should not rather have reported that those distributions were distributions of the profits of the company to its shareholders rather than the payment of compensation to employees and about that this whole case centers.

"If these sums distributed were distributed as a part of the profits of the corporation, then they should have been accounted for in the income tax report of the Consensus Company as profits and upon that the corporation should have paid a tax, which it did not.

"If, on the other hand, if they were intended to and represented actual bona fide compensation to employees of this corporation in the ordinary operation of its business; in other words, if they were ordinary and necessary expenses of the operation of the business, then they were properly deductible as they were deducted and no tax was due upon them." (Rec. 470.)

5. The government's brief before the Circuit Court of Appeals states, Brief, p. 92:

"Reading the charge as a whole, therefore, it becomes apparent that the court correctly instructed the jury that it was a question of fact—indeed the dominant issue—whether these defendants were stockholders receiving dividends or whether they were employees receiving commissions."

This Court has stated that the trial court also submitted to the jury, by the alleged erroneous instruction, the issue of the reasonableness of the commissions paid. This instruction was only given over defendants' objections after they had rested their case, on the record above referred to and without defendants having offered any evidence, relying upon the government's representations to the trial court that this issue was not involved in this case. It may also fairly be said, that while this instruction did in fact submit the reasonableness of the compensation to the jury, it was not intended for any such purpose. It was given as an abstract proposition of law, namely, that in the ordinary income tax case, the government is not bound to prove the entire amount of taxes alleged to have been evaded.⁶ Even assuming the trial court intended to give this instruction as the basis for submitting to the jury the question of the reasonableness of the compensation (now claimed by the government for the first time in this Court), the giving of the instruction under the condition of this record was clearly erroneous and prejudicial to the defendants. They had offered no evidence to meet this issue, relying upon the statements of the trial court and the government's position as stated.

At the time our motions for directed verdicts were presented and overruled, it was incumbent upon all defendants to decide whether or not they should offer evidence of a defense. The answer to this question necessarily rested on the indictment, the government's evidence alone and the

6. In the Circuit Court of Appeals, the government nowhere argued that the question of reasonableness of these payments was involved in the case; that their evidence was sufficient for the jury to find that these payments were unreasonable and that, therefore, the instruction in question was proper. The government's position as to this instruction was that numerous courts, including the Seventh Circuit, had held as a matter of law, that the government was not bound to prove that the defendant evaded the exact amount of taxes charged in the indictment. (See Government's Brief, pp. 92-93.)

colloquy between court and counsel which had just taken place in connection with defendants' motions for directed verdicts. What was the theory of the indictment and on what theory did the government claim that its evidence sustained the charges of this indictment? Its theory, as represented to both the trial court and defendants' counsel, was that the payment of these commissions was a mere subterfuge for the distribution of dividends and *the question whether these commissions represented reasonable compensation for services rendered was not involved in this case*. In determining the question whether or not we should offer any defense, we certainly had a right to rely upon the charges of the indictment (the only allegation in the indictment as to why these deductions were improper was that defendants rendered no services); the questions propounded to both sides by the trial court and the position taken by the government in answer to those questions.

In view of this position taken by the government as to this question, there was no reason for the defendants to present evidence of the services rendered by them, to show that they in fact earned these commissions or to show that the payments made them were not unreasonable compensation for their services. There was no reason for any such proof under the theory advanced by the government at that time. Had either the government or the trial court taken the position on which this court based its opinion, that a *prima facie* case had been made out showing that the commissions were unreasonable compensation for the services rendered, it would have been necessary for us to offer a defense. The government not only claimed that this was not the theory of their case but claimed just the opposite namely that this question was *not involved*. Under this state of the record, were the defendants and their counsel bound to anticipate that the government would completely shift its position in this court—a final court of review—and argue that its evidence established that these pay-

ments were unreasonable? Were the defendants and their counsel bound to anticipate that this court, a final court of review, would adopt the argument of the government and in deciding the issues in this case hold that the question of the reasonableness of the compensation paid was the dominant issue in the case and that the government's evidence had established a *prima facie* case on this question? This Court's opinion is necessarily based on its conclusions as above stated.

The government persisted in their position before the trial court in the Circuit Court of Appeals: In its brief before that Court, the government said (page 82):

"On the basis of the foregoing, it is respectfully submitted that there is no issue involved in this case regarding the question of whether commissions may be deducted or whether the payments were reasonable. We cannot repeat too often that there are no questions concerning commissions, because these payments were dividends and were known to be such by the defendants. . . . If the record establishes that these defendants knew they were getting dividends and nevertheless attempted to evade the taxes of the company by charging them as commissions, then it is palpably immaterial whether they were or were not services or whether the payments did or did not exceed the reasonable value of these services." (Italics ours.)

In the oral arguments before that Court, their position still was that these payments were either dividends in their entirety, and therefore improperly deducted, or commissions in their entirety, and therefore a proper deduction—that there could be no middle ground and the question of the reasonableness of the compensation was immaterial. This was entirely inconsistent with their theory of the case before this Court that the payments were unreasonable compensation, the basis upon which this Court made its opinion.

The Circuit Court of Appeals recognized this position

taken by the government. In their opinion that Court said:

"There was no proof and no effort by the Government to show that the services disclosed constituted the total of those performed and no effort to show the reasonable value of such services." (Rec. 500.)

"Under the Government's theory, however, it is immaterial and irrelevant as to whether the defendants performed services for which they might have been entitled to compensation or salary. The case was tried and is presented here on that theory. In other words, the Government argues that conceding the defendants rendered services for which they might have been entitled to compensation, yet the disbursements were received as corporation dividends and were, therefore, unlawful deductions." (Rec. 501.)

"The Government in its brief and in oral argument before this Court asserts that the deductions in question must be treated either as dividends in their entirety, and if so as lawful deductions, or as commissions in their entirety, and therefore properly deducted. In other words, in accordance with this argument there can be no middle ground." (Rec. 502.) (Italics ours.)

There can be no question but that the Circuit Court of Appeals correctly analyzed and stated the position of the government both before the trial court and before that court.⁷ This Court has held that the Circuit Court of Appeals erroneously construed the Cohen Grocery case as applicable to the facts here, and, also, this court, in its

7. As conclusive evidence of the position taken by the government in the court below, we have quoted at some length from its brief before that court and the opinion of that court. The opinion of that court further refers to the same position advanced by the government in its oral argument. This oral argument was transcribed and the transcript is in the possession of the Solicitor General. In our brief, page 25, we quoted from this transcript. This transcript will further show that the government before the Circuit Court of Appeals conceded that it had offered no evidence to show that these payments were unreasonable. The Solicitor General has assured us that he will make this transcript available to this court, if it so desires.

opinion, defined the correct principles of law applicable to this case. Under these principles of law, irrespective of the Cohen Grocery case, the Circuit Court of Appeals, in view of the position taken and the concessions made by the government before it, could do nothing else but reverse the judgment of the trial court. **Had the government, before this court, argued that these payments were either proper or improper in their entirety, had the government conceded that they had offered no evidence to show that these payments were unreasonable and had the government argued that the questions of the reasonableness of these payments was not involved in this case, this Court under the very principles of law laid down in its opinion could have done nothing else than to have affirmed the judgment of the Circuit Court of Appeals.**

For the first time, before this court, the government shifted its position and inferentially argued here that there was sufficient evidence from which a jury could infer that these payments were unreasonable. (Govt. Brief, page 33.) We pointed out to this court (Kruse Brief, pages 25-32) that this was a plain shift of position from the government's theory propounded in both of the courts below. We did not develop how unfair such contention was to the defendants when first urged in the final court of review, or how prejudicial such a conclusion by this court would be to the defendants.

The government asked this court to affirm the judgment of the trial court and reverse the judgment of the Circuit Court on a theory which was not only never advanced by the government to the trial court nor propounded by it to the Circuit Court of Appeals, but which theory was in direct contradiction to its theories in both courts below. This court—a court of final review—has adopted this theory. This theory has emerged for the first time here when the defendants cannot possibly offer any proof of any character whatsoever justifying the commissions so

paid to them. Do not the most fundamental principles of fair dealing require that they be afforded that right?

We have been consistent in our position throughout the trial of this case and its review both by this court and the Circuit Court of Appeals.

When this court held,

“We are convinced that all of this is sufficient to support a finding by the jury that the respondents wilfully attempted to make unreasonable allowances for personal services”

all of our arguments advanced in the previous courts completely fell and became of no avail. We had no opportunity to meet this theory by factual proof in the only place it could have been met—the trial court below—not only because that theory had never been advanced by the government but the government claimed that this question was not even involved in this case.

As heretofore stated, we had a right to rely upon the theory then stated by the government when we determined to offer no defense. Under the opinion of this court, the real and dominant issue was whether or not the defendants earned these commissions. This issue was defined for the first time by this court in its opinion here. It would seem only fair, under these circumstances, that the defendants be afforded the right to meet this issue of fact by offering the defense that they did earn these commissions. The only reason they did not do so in the trial court was because of the fact that the government claimed such issue was not involved in the case.

It may be argued that the defendants and their counsel were bound to comprehend that the government's evidence established a *prima facie* case as to the unreasonableness of the compensation paid. The trial court did not realize this and the government in effect conceded its evidence had no such probative value when it claimed that this ques-

tion was not involved. The government persisted in this position in the Circuit Court of Appeals and again insisted that this issue was not involved in the case. The Circuit Court of Appeals reversed the case in reliance upon the position so taken by the government. In view of these circumstances, it would indeed be unfair, to say to the least, to attribute to defendants' counsel the ability to foresee a disposition of this case by the highest court of review upon a theory which the government at the time of trial definitely stated was not involved in the case, and so argued to the Circuit Court of Appeals.

Conclusion.

The administration of criminal jurisprudence is not a catch-as-catch-can game. It must afford to every defendant a full opportunity to present a defense upon the merits of the case as set forth in the indictment and propounded by government counsel. The law favors a trial on the merits. We have no complaint whatsoever to offer to the principles laid down by this court in its opinion. We do, however, earnestly and sincerely contend that the only fair treatment that can be afforded to these defendants, in view of that opinion, is to remand the case to the trial court for a retrial.

Respectfully submitted,

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and Lester A. Kruse, De-
fendants-Respondents.*

JOSEPH A. STRUETT,

WARREN CANADAY,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 54, 55, and 56.—OCTOBER TERM, 1941.

54 The United States of America,
Petitioner,
vs.
James M. Ragen,

55 The United States of America,
Petitioner,
vs.
Arnold W. Kruse,

56 The United States of America,
Petitioner,
vs.
Lester A. Kruse.

On Writs of Certiorari to
the United States Circuit
Court of Appeals for the
Seventh Circuit.

[January 5, 1942.]

Mr. Justice BLACK delivered the opinion of the Court.

Section 145 of the Revenue Act of 1932 provides that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony" 47 Stat. 217. (There are identical provisions in the Revenue Acts of 1934 and 1936. 48 Stat. 725; 49 Stat. 1703.) Petitioners were indicted, tried, and convicted in the District Court for conspiracy to violate, and for violation of, this provision. The Circuit Court of Appeals, one judge dissenting, reversed. *United States v. Malaska*, 118 F. 2d 128. Because questions of importance in the enforcement of this criminal statute and the administration of the revenue laws were raised, we granted certiorari. 313 U. S. 557.

In computing net corporate income subject to tax, a deduction is permitted for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered" See, 23(a), Revenue Acts of 1932, 1934, and 1936. 47 Stat. 179; 48 Stat. 688; 49 Stat. 1658. "Dividends" distributed from net corporate profits are not allowable deductions. But "commissions", if incurred as necessary business expenses and as a reasonable allow-

ance for personal services actually rendered, are deductible from gross income. The larger the allowable deduction the smaller are the net taxable income and the tax imposed. The first four counts of the indictment set out attempts by the defendants to evade income taxes of the Consensus Publishing Company for the years 1933 to 1936, through a fraudulent scheme whereby, under the guise of paying commissions which were deducted from gross income, the corporation distributed dividends deduction of which the statute does not permit. The fifth count sets out a conspiracy to accomplish similar results for the years 1929 to 1936.

After an examination of the evidence in the record including numerous exhibits, we are satisfied that the jury could justifiably have found the following facts to be true:

The Consensus Publishing Company, an Illinois corporation, was organized in 1929 to carry on the business of preparing "run-down" sheets, daily bulletins containing information on horse racing, and selling them to bookmakers. The original stock ownership was distributed among Arnold Kruse (20 shares), James Ragen, Sr. (20 shares), William Molasky (30 shares), and Cecelia Investment Company (30 shares), a holding company controlled by Moses Annenberg, the dominant figure in several other corporations which were engaged in enterprises connected with betting on horse races. Kruse and Ragen were executives in other Annenberg companies. Molasky alone lived in St. Louis, where Consensus conducted its principal business operations, but he delegated to one Gordon Brooks, an employee of another corporation owned by Molasky, the job of collecting receipts, preparing records and reports, and supervising printing for Consensus, work which took Brooks an hour and a half a day on the average except for the one day each week when the preparation of operating reports for the Chicago office required about three hours.

For several years Consensus made a weekly distribution of money to its shareholders in direct proportion to their holdings. In the period covered by the indictment, only the 30% of the distribution going to Cecelia Investment Company was treated as dividends in Consensus' tax returns. The remaining 70%, although referred to in some of the corporation's confidential weekly reports to stockholders during the period as "dividends", was nevertheless in its income tax return deducted from gross income as "commissions." The deductions thus claimed were \$10,761 in 1929, \$62,961 in 1930, \$64,791 in 1931, \$57,255 in 1932, \$54,538 in 1933,

\$60,172 in 1934, \$76,714 in 1935, and \$119,756 in 1936. The book-keeping system under which 70% of the funds remaining after payment of expenses was charged as commissions was set up in 1929 in accordance with instructions from Arnold Kruse.

In 1934, Kruse, having learned of a decision of the Board of Tax Appeals that distributions of profits as commissions would not be allowed as a deductible expense if made in accordance with stock-holdings, set in motion a series of transactions retroactively modifying the relationship between Consensus and its stockholders. He directed an employee to destroy the original stock book of the company, issue new stock certificates bearing the date of incorporation (September 18, 1929), and then immediately to cancel the new certificates and issue a single certificate for one hundred shares to the Cecelia Investment Company. In 1935 or 1936, Kruse ordered the drawing up of written yearly contracts of employment for the several years from 1930 on between Consensus and the individuals to whom "commission" payments had since the inception of the company been made. In each contract, the compensation was to correspond identically with the amount that had already actually been paid.

Except for delays in destroying the original stock book and the original stock certificates, this plan was promptly carried out. Moreover, corporate minutes were drawn up, appropriately back dated, which set out the stock "issue" and the employment contracts as if they were actual events contemporaneous with the false dates of recording.

Among the back dated contracts were several between Consensus and the respondent Lester Kruse, son of Arnold. These together with a back dated assignment by Arnold to Lester of his "contract of employment" with Consensus were to afford ostensible documentation of a shift to Lester, after March, 1933, of the share that had formerly gone to Arnold.¹ Similarly, after 1931, Consensus paid the share that had formerly gone to Ragen ~~to~~ Ragen's son. Here, too, a set of back dated papers documenting the shift was fabricated. After their sons became the nominal recipients of commissions, Kruse and Ragen continued to be connected with the affairs of Consensus. Kruse, for example, directed the creation of the spurious papers and records already described, and Ragen

¹ Or to his wife. From August, 1932, to March, 1933, Consensus distributed 20% of its earnings to Mrs. Arnold Kruse. No explanation is apparent in the record.

from time to time at least until 1935 signed "commission" checks of Consensus which were paid in regular course.²

If, from the foregoing and other supporting evidence in the record, the jury could have found that any one of the defendants had, with the intentional cooperation of the others, received "commissions" without rendering any services whatsoever, it would have been possible for the trial judge to have submitted the case to the jury without calling upon it to decide any questions of reasonableness of compensation for services actually rendered. If, however, each defendant had performed some service for the corporation, the jury would have had to consider whether or not the "commissions" had intentionally been made excessive so that a portion of payments made in the guise of meeting expenses actually constituted a distribution of dividends. There was evidence which, if believed, tended to establish that each defendant had performed some service, although of an irregular and undefined nature. Hence, it seems to us entirely proper for the trial judge to have submitted the case to the jury with a charge not necessarily calling for a determination of whether all or none of the "commissions" paid to each defendant were dividends, but permitting a determination of whether the "commissions" were intentionally made to include substantial amounts which should have been treated as dividends. Upon such a charge,³ the jury found Arnold Kruse

² Because of this and other circumstances showing Ragen's continued participation in the affairs of Consensus, we conclude that the argument, separately made on his behalf, that there was insufficient evidence to establish his connection with any scheme to evade taxes, is without merit.

³ The crucial portions of the District Judge's charge to the jury are as follows:

"If these sums distributed were distributed as a part of the profits of the corporation, then they should have been accounted for in the income tax report of the Consensus Company as profits and upon that the corporation should have paid a tax, which it did not.

"If, on the other hand, they were intended to and represented actual bona fide compensation to employees of this corporation in the ordinary operation of its business; in other words, if they were ordinary and necessary expenses of the operation of the business, then they were properly deductible as they were deducted and no tax was due upon them.

We are concerned only with the question of whether these men have entered into a conspiracy, into a scheme whereby as a result this corporation, the Consensus Company, under the guise of commissions, distributed to its shareholders sums that actually represented a division of profits.

and Ragen guilty on all five counts, and Lester Kruse guilty on counts four and five.⁴

In the charge as given, the Circuit Court of Appeals found reversible error. The gist of the court's argument is contained in the following excerpt from the opinion:

"We have reached the conclusion that where a statute permits a reasonable deduction for services, a criminal prosecution can not be maintained by proof other than that such services were not rendered. It is not sufficient to allege or prove that a deduction claimed for services is unlawful because the amount charged is unreasonable. Such a charge would leave to the trier of the facts the responsibility for fixing the standard by which a defendant's guilt would be determined. The standard would vary according to the views of different courts and juries. Such a theory would be violative of the defendant's constitutional rights, and void. *United States v. L. Cohen Grocery Co.*, 255 U. S. 81 . . . ; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221 . . . ; *Collins v. Kentucky*, 234 U. S. 634, 638"

Determination of allowable deductions by reference to a standard of "reasonableness" is not unusual under federal income tax laws. For example, the deductions allowed for depreciation and obsolescence, for bad debts, and for ordinary and necessary business expenses (other than compensation for services) are designated in the Internal Revenue Code as "reasonable." 53 Stat. 1, Secs. 23(1), 23(k)(1), 23(a)(1). If, as the opinion below suggests, the only question that can properly be submitted to the jury is whether the *entire* deduction is fabricated, an unconscionable taxpayer can immunize himself from the criminal sanctions for tax evasion by the simplest of expedients. He need only find a legitimate item of deduction and then pad it as much as his purpose requires. By

"If these defendants had that kind of plan and carried it out, if they wilfully and intentionally entered into such an arrangement, there wouldn't be any question of their guilt.

It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits. It is not necessary that the government prove all of the figures precisely as they are charged in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern, in the amount charged in the indictment or substantial parts thereof, diverted them from the form of profits and received them in the form of commission."

⁴ Molasky, James Ragen, Jr., and the Consensus Publishing Company were also found guilty. The government has not sought review of the Circuit Court of Appeals' reversal of the conviction of Molasky and James Ragen, Jr., which involved additional issues of no relevance to the respondents here. The corporation did not take an appeal from the judgment of the District Court.

⁵ *United States v. Molasky, supra*, 139.

transforming the question "Should any deduction have been made?" into "Was the deduction made in excess of a reasonable allowance?" he can, if the theory accepted below be correct, largely destroy the deterrent effect of a penal statute passed by Congress.

We have concluded, however, that the ground of decision below is untenable. The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct. Cf. *Nash v. United States*, 229 U. S. 373. The cases cited by the Court of Appeals affirm no such proposition. In the *Cohen Grocery* case, this Court held a conviction under Section 4 of the Lever Act, 41 Stat. 294, 298, unconstitutional because the statute left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against," and because an "attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimate of the court and jury." *United States v. Cohen Grocery Co.*, *supra*, 89. In the *International Harvester* case, this Court expressed the view that assurance that the state statute there in issue was complied with called for "gifts that mankind does not possess." *International Harvester Co. v. Kentucky*, *supra*, 224. And in the *Collins* case, the same statute was said to call for a determination of conduct "not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions." *Collins v. Kentucky*, *supra*, 638.

No such unworkable standards are involved here. Section 145 of the Revenue Act of 1932 standing alone is not vague nor does it delegate policy making powers to either court or jury. It declares that "any person who willfully attempts in any manner to evade or defeat any tax imposed" by the act "shall . . . be guilty of a felony" and specifies penalties in addition to those otherwise provided by law. That such acts of bad faith are not beyond the ready comprehension either of persons affected by the act or of juries called upon to determine violations need not be elaborated. Nor does the particular mode of evasion here alleged, intentional deduction of dividends in the guise of compensation for personal services, so transform the nature of the offense as to make the actors less aware that they are committing it or juries less competent to detect it. The statutory specification of permissible deduction here

in question is of long standing. For years thousands of corporations have filed income tax returns in accordance with the direction to deduct "a reasonable allowance for salaries or other compensation for personal service actually rendered," and there has not been any apparent general confusion bespeaking inadequate statutory guidance. A finding of unconstitutional uncertainty in this section of the act as applied here would be a negation of experience and common sense.

On no construction can the statutory provisions here involved become a trap for those who act in good faith. A mind intent upon willful evasion is inconsistent with surprised innocence. Cf. *Gorin v. United States*, 312 U. S. 19; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497; *Omachevarria v. Hiko*, 246 U. S. 343. And the charge given by the trial court amply instructed the jury that scienter is an essential element of the offense.

We conclude that it was not error to submit to the jury the question of whether or not the respondents attempted to make unreasonable allowances for personal services. The respondents, however, raise a further objection going not to the propriety of such a submission as a matter of law, but to the insufficiency of the evidence upon which the jury could have found an answer to the question submitted. They contend that the record discloses that the recipients of commissions performed some services; that the record fails to show that the services disclosed were the only services rendered; that there was no direct testimony as to the total amount of services rendered or the reasonable value thereof; and that, therefore, the jury had no rational basis upon which to conclude that the sums deducted as "commissions" were more than a reasonable allowance for compensation for the services rendered. We must reject this contention.

The business conducted by Consensus, a business which, according to the testimony of a person who was in immediate charge of its major operations, normally required only an hour and a half daily of managerial supervision, would hardly seem to call for additional executive services worth what Consensus paid in "commissions." The same witness testified that he had never seen some of the recipients of "commissions", and that his only contact with one of them was two telephone conversations. This testimony, too, belies participation by the respondents in the business activities of Consensus to a degree justifying payment of the high "commissions"—equal on the average to about half of gross revenues and amounting

each year to several times all other wages and salaries⁶—as a *quid pro quo* for their services. Moreover, there is the additional circumstance, damaging to the respondents' contention, that year in and year out, 30% of earnings after deduction of expenses was paid to the Cecelia Investment Company as dividends, and 70% to the respondents or other individuals as "commissions." This uniformity in the computation of "compensation" is difficult to reconcile with the variations in extent and kind of personal services which one would expect to find in accounts reflecting bona fide allowances for personal services. Further, there is the circumstance that the "commission" payments were always in proportion to original stock holdings. And darkening the whole picture is the atmosphere of purposeful concealment evinced by the destruction of some important corporate papers and the fabrication of others. We are convinced that all of this is sufficient to support a finding by the jury that the respondents willfully attempted to make unreasonable allowances for personal services.

The respondents also urge that there was a fatal variance between the indictment and the proof in that the indictment alleges that the commission payments were actually dividends in their entirety whereas the evidence indicates that some services were performed. The fifth count of the indictment does refer to "all of the moneys . . . paid . . . by virtue of the . . . so-called 'Employment Contracts' " as "in truth and in fact, distributions of profits and dividends." But the gravamen of the charge is distribution of dividends in the guise of commissions, and the respondents cannot fairly claim that they were not adequately apprised of the nature of the offense. Any variance which existed, at most a matter of the extent of the alleged tax evasion, involves no elements of surprise prejudicial to the respondents' efforts to prepare their defense. Cf. *Berger v. United States*, 295 U. S. 78; *Bennett v. United States*, 227 U. S. 333.

The respondents have made further contentions which we conclude after consideration are without merit.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

It is so ordered.

Mr. Justice ROBERTS, Mr. Justice MURPHY, and Mr. Justice JACKSON took no part in the consideration or decision of this case.

⁶ In 1936, for example, "commissions" amounted to \$119,756 as compared with \$8,816 paid out for other wages and salaries.

